2004

STATE OF UTAH, Plaintiff and Petitioner, v. ANTHONY JAMES VALDEZ, Defendant and Respondent.: Brief of Petitioner

Utah Supreme Court

IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	
v.	:	
ANTHONY JAMES VALDEZ,	:	Case No. 20040633-SC
Defendant/Respondent.	:	

BRIEF OF PETITIONER
UPON GRANT OF CERTIORARI REVIEW

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BRIEF OF PETITIONER
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STATEMENT OF JURISDICTION

The State appeals the decision in ***State v. Valdez***, 2004 UT App 214, 95 P.2d 291, which reversed defendant's convictions for aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (West 2004); possession of a dangerous weapon by a restricted person, a second degree felony, in violation of Utah Code Ann. § 76-10-503(2)(a) (West 2004); and criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-106 (West 2004). ***See*** *Addendum A (Opinion).* This Court has jurisdiction pursuant to its grant of certiorari review. ***See*** Utah Code Ann. § 78-2-2(5) (West 2004). ***See*** *Addendum B (Order Granting Certiorari Review).*

STATEMENT OF ISSUES, STANDARDS OF APPELLATE REVIEW, AND PRESERVATION OF ISSUES

The State raises two issues concerning the court of appeals' analysis and application of ***Batson v. Kentucky***, 476 U.S. 79 (1986) (prohibiting racial discrimination in the exercise of peremptory strikes), and its progeny, ***J.E.B. v. Alabama***, 511 U.S. 127 (1994) (prohibiting peremptory strikes based solely on gender). Because the analytical underpinnings are identical, "***Batson***" will be used generically to refer to both racial- and gender-based objections.

Issue 1: Is a ***Batson*** objection timely if it is made after the trial jury is sworn and the remainder of the venire excused?

Issue 2: Did the court of appeals fail to apply the ***Batson*** standards and analysis established by this Court and the United States Supreme Court?

Standards of Review: On certiorari, the decision of the court of appeal is reviewed for correctness. ***Thomas v. Color Country Management***, 2004 UT 12, ¶ 9, 84 P.3d 1201. What constitutes a timely objection is a question of law. ***Cf. State v. Wach***, 2001 UT 35, ¶ 38, 24 P.3d 948 (for-cause challenge). The determination of the applicable legal standards is also a question of law. ***See Thomas***, 2004 UT 12, ¶ 9; ***State v. Pena***, 869 P.2d 932, 936 (Utah 1994).

Preservation: This Court granted certiorari review of Issues 1 & 2, which were raised by the State and addressed in ***Valdez***, 2004 UT App 214. ***See*** *Add. A & B.* ***See also*** *Brief of Appellee [BrAplee] at 12-39.*

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Rule 18, Utah Rules of Criminal Procedure, is attached in *Addendum C*, together with any other provision cited in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with aggravated burglary, aggravated assault, child abuse, possession of a dangerous weapon by a restricted person, and criminal mischief (R. 35-38). A jury trial was held on October 29-30, 2002 (R. 131-34).

The initial jury venire consisted of 11 men and 14 women (R. 94). Voir dire was fully conducted (R209: 10-66). Three men and two women were excused for cause without objection (R. 94). A third woman was excused for cause on defendant's motion over the prosecutor's objection (R. 94; R209: 66-69). The prosecutor used four peremptory strikes against women; the defense used four peremptory strikes against men (R. 94). The selected jury consisted of four men and four women (R. 94). Defendant did not object when the prosecutor exercised his peremptory strikes or when the selected jurors were announced (R209: 70).

The remainder of the venire was excused from service (id.). The trial jury was sworn (id.). The court trial preliminarily instructed the jury (R209: 70-76). The information was read (R209: 76). The jury was excused for lunch (id.).

After the jurors left the courtroom, the court discussed potential jury instructions with counsel (R209: 76-78). Defendant stipulated that a previous conviction for a violent felony rendered him a "restricted person" for purposes of the weapon charge (R209: 77-78). The

parties agreed that the jury would not be informed of defendant's prior conviction and a special verdict form would be used to determine if he possessed a gun on the date charged (id.).

The court then asked the parties if they had "[a]nything else" to discuss before the noon recess (R209: 78). For the first time, defense counsel questioned the prosecutor's peremptory strikes: "Your Honor, I noticed that when we were doing the jury selection that the State struck all women, and that's a basis for a ***Batson*** challenge" (R209: 78). The trial court pointed out that ***Batson*** was not a gender-based case (id.). Defense counsel continued:

> Whatever the follow-up case is that extended Batson [sic], the gender, and I think at this point all I need to do is establish that there was a pattern. And I think the fact that the State used all of their peremptories on women – I don't know if there's any better evidence to show that there is a pattern of – based on gender. I don't think we had any minorities at all, even Ms. Gonzalez didn't appear to be Hispanic, so I don't think I'd have any based on race, but on the fact that the State moved every single one of the peremptories were based on--.

(id.).[1] ***See*** *Addendum D (Objection and Ruling).*

The prosecutor responded: "[D]efense counsel's objection is untimely. We've seated the jury, sworn the jury, the proper ***Batson*** challenge must be made prior to that point" (id.).

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[1]The court of appeals overstated the basis of defendant's objection: "Valdez's counsel noted that the State used all four of its peremptory challenges to exclude women from the jury. Valdez further noted that in a domestic violence jury trial, gender issues tend to be highly charged. Ultimately, he argued, the State's exclusion of only women from the jury cannot be disregarded, on its face, in the context of the case." ***Valdez***, 2004 UT App 214, ¶ 2.

The trial court asked: "Well, not withstanding that, can you give me a basis to rebut [a] ***Batson*** type challenge?" (R209: 79).[2]

The prosecutor then explained his peremptory strikes against Lydia Valerio, Joyce Gonzalez, Tamara Thornton, and Paula Morley (R. 94; R209: 79-80). ***See*** *Add. D.*

Lydia Valerio was the officer manager for a state-wide non-profit agency which provides medical, housing, training, and employment assistance to brain-injured individuals (R209: 14-16). ***See*** *Addendum E (Voir Dire Examination).* Valerio was personally involved in retraining individuals with sustained brain injuries and in providing housing and medical referrals to others (id.). The prosecutor explained that he struck her because of her employment, which he believed might make her "somewhat overly compassionate" (R209: 79) (*Add. D*).

Joyce Gonzalez cleaned her adult children's homes (R209: 18-19) (*Add. E*). She wanted to "retire," but her children, all in their forties, would not let her quit (id.). She claimed to have heard about the case on the news (R209: 35) (*Add. E*). She remembered "hearing about the break-in in the area, just the address," which she claimed was "Ensign Avenue" (R209: 65). When the court informed her that the incident had not happened on Ensign Avenue, but on Emery Street, Gonzalez asserted that she was certain it was the same incident because "I read the newspaper every day" (R209: 65-66) (*Add. E*). She admitted that

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[2]Based on this question, the court of appeals concluded that the trial court "ignor[ed] the State's argument . . . [and] impliedly found good cause under rule 18 [Utah Rules of Criminal Procedure] to allow a challenge to the State's peremptory strikes beyond the usual [time] limits." ***Valdez***, 2004 UT App 214, ¶ 10.

her memory was vague, but insisted she remembered the "name and the incident" and knew the facts "sounded familiar to me" (R209: 66). When asked if she could disregard any prior information she may heard about the case in reaching a verdict, Gonzalez only answered, "I think I could" (id.). The prosecutor peremptorily struck her based on her voir dire responses. He felt that even though she claimed that her prior knowledge of the case would not affect her judgment, her responses were too "matter of fact" (R209: 79) (*Add. D*).

Tamara Thornton worked for her husband's family-owned plumbing and heating business (R209: 14). She remembered hearing about a house break-in on the television news, but was not sure if it was the same case and could not remember any details (R209: 34). She had previously served on a jury, which returned a verdict of manslaughter (R209: 49-50). ***See*** *Add. E.* The prosecutor noted that, like Gonzalez, Thornton had heard about the case (R209: 79) (*Add. D*). But due to the lapse of time between jury selection and defendant's ***Batson*** objection, the prosecutor could not recall specifically what Thornton had said about the case (R209: 79). The prosecutor explained that he struck Thornton because she had previously served on a jury, which had returned a verdict of manslaughter, a verdict the prosecutor assumed represented a "one-step reduction" from the charged offense (id.).

Paula Morley was a part-time Title I-funded school aide, who also taught piano at home (R209: 27-28) (*Add. E*). The prosecutor explained that he had "agonized" over whether he should use his last strike against her or the next juror, Ron Hardy, who was a Vietnam veteran, hunted as a hobby, and had a brother in prison, whom Hardy believed was properly incarcerated (R209: 29-30, 45-46, 79-80). The prosecutor explained that he had

consulted with his co-prosecutor, who favored keeping Mr. Hardy on the jury based on his firearm experience (R209: 79-80) (*Add. D*). As with Valerio, the prosecutor felt that Morley's employment might make her "overly compassionate" and more inclined to "let bygones be bygones" (R209: 80). Comparing Morley with Hardy, he chose to remove Morley (id.).

After the prosecutor explained his strikes, defense counsel was silent and did not object to the explanations or assert contrary facts (R209: 80). The trial court then ruled:

> All right. Thank you. And I'm satisfied with your explanation. I find with regard to peremptory challenges No. 6, Tamara Thornton, No. 7 Linda Valerio, No. 10, Joyce Gonzalez, and No. 19, Paula Morely [sic] are gender neutral, they are related specifically to this case. They were clearly stated and they are specific and legitimate. Therefore I am denying the challenge based on gender. I also note this is a jury of four men and four women.

(R209: 80) (*Add. D*). Again, defense counsel remained silent and did not object to the ruling or ask for additional findings (id.).

Trial proceeded. Defendant was acquitted of aggravated assault of his girlfriend, Chrystal Jimenez, who recanted her prior statements implicating defendant, and of child abuse (committing domestic violence in the presence of their son) (R. 138-42; R211: 147-48). The jury convicted defendant of aggravated burglary of Laura Abeyta's (Chrystal's friend's) apartment and of criminal mischief for slashing Chrystal's car tires (id.). He was also convicted of the weapon charge (R211: 147-49). On January 13, 2003, defendant was sentenced to consecutive terms of imprisonment (R. 178-80).

Defendant appealed his convictions (R. 184-85). The appeal was poured over to the court of appeals.

The court of appeals concluded that rule 18, Utah Rules of Criminal Procedure, allows a ***Batson*** objection to be made any time "before evidence is presented" and, consequently, held that defendant's objection—made after the jury was sworn and the remainder of the venire excused, but prior the taking of evidence—was timely. ***Valdez***, 2004 UT App 214, ¶¶ 7-11. ***See also*** *Addendum C (Rule 18).* Turning to the merits, the appellate court acknowledged that the prosecutor's explanations for the peremptory strikes were not inherently discriminatory. ***Id.*** at ¶¶ 21 & 29. Nevertheless, the appellate court concluded that the explanations were "mere pretext as a matter of law" because they were not "tied to the issues, evidence, and context of the case at hand." ***Id.*** at ¶ 29. The court of appeals held that the trial court abused its discretion when it failed to reject the prosecutor's explanations "outright" and instead proceeded to assess their credibility and validity. ***Id.*** at ¶ 31. Accordingly, the court of appeals refused to review the trial court's ultimate finding that the strikes were made without discriminatory intent and reversed the trial court's denial of defendant's ***Batson*** objection. ***Id.***

Because the court of appeals reversed defendant's convictions based on its ***Batson*** determination, it did not address defendant's other claim that evidence of Battered Woman Syndrome (BWS) was erroneously admitted. ***Id.*** at ¶ 17 n.2.

The State petitioned for and was granted certiorari review of ***Valdez***'s ***Batson*** analysis and rulings. ***See*** *Add. B.*

STATEMENT OF FACTS

The facts underlying defendant's convictions are not relevant to the ***Batson*** issues raised on certiorari review. Only a brief summary is provided.

Defendant forced open the door of Laura Abeyta's apartment (R210: 16-18, 25-26, 33-36, 44, 49-50). Laura, other adults, and their children were in the living room (R210: 11-12, 15, 18-20, 33-34, 48; R211: 94-95). Defendant displayed a gun and walked into the bathroom where his girlfriend, Chrystal Jimenez, was hiding (R210: 15, 18-20, 35, 37, 50-51). He threatened to kill Chrystal in front of their young son (id.). Defendant then left the apartment and slashed the tires on Chrystal's car (R210: 38-39, 52). Chrystal fully recounted the incident during defendant's preliminary hearing, but at trial, recanted her prior statements and testimony (R207: 4-13; R210: 59-65, 80-82, 97-99). ***See Valdez***, 2004 UT App 214, ¶ 4. Laura and the other eyewitnesses implicated defendant (R210: 11-54; R211: 94-96). The jury acquitted defendant of the assaults involving Chrystal and their son, but convicted him of aggravated burglary (for the forced entry), felon in possession of a gun, and criminal mischief (for slashing the tires) (R211: 146-48).

SUMMARY OF ARGUMENT

Issue 1 - Timeliness. Until *Valdez*, federal and state courts, including the Utah Court of Appeals, uniformly recognized that a ***Batson*** objection to a peremptory strike is untimely if it is made after the jury process is completed. Strong policy reasons support strict enforcement of this time requirement. Moreover, requiring a ***Batson*** objection to be made prior to the trial jury being sworn and the remainder of the venire excused is consistent with

the contemporaneous objection rule and parallels the time restrictions placed on other types of objections to the composition of a jury. This Court should reverse the court of appeals' singular conclusion to the contrary.

Issue 2 - *Batson* Analysis. This Court, as well as the United States Supreme Court, have established clear and distinct criteria for each of ***Batson***'s three analytical steps, including applicable standards of review. The court of appeals failed to apply these standards in *Valdez*. Had the court of appeals applied the proper standards, it would have concluded that the prosecutor's explanations for his peremptory strikes were gender-neutral and would have affirmed the trial court's ultimate determination of no discriminatory intent.

If this Court determines defendant's ***Batson*** objection was untimely, it should reverse Part I of the *Valdez* opinion, but nevertheless clarify what constitutes proper ***Batson*** analysis and standards. If the objection is timely, this Court should review its merits, reverse Parts II-IV of the *Valdez* opinion, affirm the trial court's finding of no discriminatory intent, and reinstate defendant's convictions. In either case, the appeal should then be remanded to the court of appeals only for determination of defendant's remaining evidentiary claim.

ARGUMENT

POINT I

PRECEDENT AND POLICY DO NOT SUPPORT *VALDEZ'S* SINGULAR CONCLUSION THAT A ***BATSON*** OBJECTION IS TIMELY IF MADE AFTER THE JURY IS SWORN AND THE REMAINDER OF THE VENIRE IS EXCUSED

"Ordinarily, a party is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (citation and internal quotation marks omitted). The privilege, however, "is subject to the commands of the Equal Protection Clause," which forbids a party from striking a potential juror solely on account of race or gender or on the assumption that a particular race or gender is unable to impartially consider the evidence. ***See Batson***, 476 U.S. at 89 (race); ***J.E.B. v. Alabama***, 511 U.S. 127, 130-31 (1994) (gender). ***See also State v. Colwell***, 2000 UT 8, ¶ 14, 994 P.2d 177; ***State v. Higginbotham***, 917 P.2d 545, 547 (Utah 1996).

Under ***Batson*** and its progeny, a three step analysis applies:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of [ ] discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a [ ] neutral explanation (step two). If a [ ] neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful [ ] discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995). ***Accord Colwell***, 2000 UT 8, ¶ 17; ***Higginbotham***, 917 P.2d at 547.

"Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the process. ***J.E.B.***, 511 U.S. at 140. Consequently, "if purposeful discrimination is ultimately found, reversal of the defendant's conviction is mandated, without regard to the harmlessness of the constitutional error." ***State v. Macial***, 854 P.2d 543, 545 (Utah App.) (citing ***Batson***, 476 U.S. at 100), *cert. denied*, 862 P.2d 1356 (Utah 1993).

In ***Valdez***, 2004 UT App 214, 95 P.3d 291, the court of appeals acknowledges these standards, but misinterprets and misapplies them. These errors will be discussed in Point II.

The court of appeals' initial error, however, is in ruling that a ***Batson*** objection to a peremptory strike may be made after the jury process is completed. ***See Valdez***, 2004 UT App 214, ¶¶ 7-11. No other court has reached the same conclusion. Indeed, prior to ***Valdez***, Utah recognized that a ***Batson*** objection was untimely if it was made after the jury was sworn and the remainder of the venire was excused. Strict enforcement of this time requirement is consistent with precedent and rule and is supported by sound policy. Consequently, Part 1 of the ***Valdez*** opinion should be reversed.

A. The Universal Requirement that a *Batson* Objection Be Made During the Jury Selection Process.

A ***Batson*** objection must be timely. ***See Batson***, 476 U.S. at 99-100. ***See also Valdez***, 2004 UT App 214, ¶ 7 (citing ***Salt Lake County v. Carlston***, 776 P.2d 653, 655 (Utah App. 1989)). Due to the "variety of jury selection practices" in the United States,

however, what constitutes a timely objection is determined by each jurisdiction's procedural practice. ***See Batson***, 476 U.S. at 99 n.24.

The overwhelming majority of jurisdictions require a ***Batson*** objection to be made after the jury is selected, but before the selected trial jurors are sworn. ***See, e.g., Ford v. Georgia***, 498 U.S. 411, 423 (1991) (calling this period "sensible"); ***State v. Robinson***, 676 A.2d 384, 390 (Conn. 1996); ***State v. Aubrey***, 609 So.2d 1183, 1185 (La. App. 1992). ***See also*** *Wayne R. LaFave & Jerold H. Isreal, 5* ***Criminal Procedure*** *§ 22.3, at 325 & n.179 (2d ed. 1999) and at 90 (2003 Supp.)* [hereafter ***Crim. Procedure***]. Some jurisdictions require a ***Batson*** objection to be made even earlier, that is, as soon as a prima facie case of discriminatory intent is evident. ***See Crim. Procedure***, ***id.***

Until ***Valdez***, however, no jurisdiction permitted a ***Batson*** objection to be made after the jury process was completed, that is, after the trial jury is sworn and the remainder of the venire excused. ***See, e.g., Morning v. Zapata Protein (USA), Inc.***, 128 F.3d 213, 215 (4th Cir. 1997) (recognizing that requiring a ***Batson*** objection to be made prior to the venire being dismissed is a "modest and well-justified step" recognized in the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits); ***Garcia v. Excel Corp.***, 102 F.3d 758, 759 (5th Cir. 1997) (directing trial courts to sua sponte reject a ***Batson*** objection if it is made after the venire is dismissed); ***Robinson***, 676 A.2d at 390 n.12 (citing an extensive list of jurisdictions which recognize that the dismissal of the venire is the outside limit for a ***Batson*** objection, but the preferred time is before the trial jury is sworn); ***State v. Ford***, 2001 MT 230, 39 F.3d 108, 112 (Mont. 2001)

(citing numerous state and federal decisions which bar a ***Batson*** objection after the remainder of the venire is dismissed), *cert. denied*, 537 U.S. 973 (2002).

Moreover, until ***Valdez***, all jurisdictions—including Utah—recognized that ***Batson***'s unique remedies justify strict enforcement of its timeliness requirement. If a ***Batson*** error is found on appeal, prejudice is presumed and reversal mandated. ***See Batson***, 476 U.S. at 100; ***Macial***, 854 P.2d at 545. Consequently, quick and immediate resolution of a ***Batson*** objection in the trial court is essential. Indeed, ***Batson*** contemplated that its objectives could be achieved "without substantial disruption of the jury selection process." ***See Hernandez v. New York***, 500 U.S. 352, 358 (1991). The most effective and prompt corrective action is immediately reinstating any wrongfully struck juror, a remedy which can only occur if the ***Batson*** objection is made during the jury selection process. ***See McCrory v. Henderson***, 82 F.3d 1243, 1247-49 (2nd Cir. 1996) (citing an extensive list of authorities in support).

In contrast, permitting a ***Batson*** objection after the jury selection process is completed undermines the policy of the contemporaneous objection rule. The contemporaneous objection rule requires a party to specifically and timely raise an objection so that trial court has a fair opportunity to correct the error and avoid reversal on appeal. ***See State v. McCardel***, 652 P.2d 942, 947 (Utah 1982). If a ***Batson*** objection is made after the jury selection process is completed, that policy is defeated. For if a violation is found only after the venire has been dismissed, the wrongfully struck juror cannot be reinstated. At that point, the only available remedy is mistrial–a remedy which is neither prompt, efficient, nor

corrective of the discrimination committed. ***See McCrory***, 82 F.3d at 1247; ***Ford***, 39 P.3d at 12.

A contemporaneous objection requirement is also designed to prevent invited error. ***Cf. McCardel***, 652 P.2d at 947. Allowing a ***Batson*** objection to be made after the jury process is completed invites error because it "permit[s] the defendant to manipulate the system to the extreme prejudice of the prosecution and give[s] the defendant a strong inducement to delay raising the objection until trial is underway." ***See McCory***, 82 F.3d at 1247-49 (extensively discussing the policy reasons for the strict enforcement of a timely objection rule in ***Batson*** cases). ***Accord Morning***, 128 F.3d at 215 (same).

Additionally, allowing a ***Batson*** objection to be made after the remainder of the venire is excused hinders a prosecutor's ability to fully explain his strikes and the trial court's ability to accurately assess the credibility of those explanations. If the stricken juror is in the courtroom when a ***Batson*** objection is made, her name can more easily be matched to her face and better correlated to her voir dire answers. ***See Aubrey***, 609 So.2d at 1185-86 (recognizing that "an obvious advantage of a prompt ruling on ***Batson*** challenges is that memories are fresh and a better record can be made of [ ] relevant factors [and] the neutral reasons for challenging the jurors") (citation and internal quotation marks omitted). ***See also*** *17 No.3 Federal Litigator 71* (discussing similar reasoning adopted by the Second Circuit).

In sum, the universal rule requiring a ***Batson*** objection to be made during the jury process permits prompt corrective action and prevents "costly mistrials and unnecessary reversals." ***See Morning***, 128 F.2d at 215. ***Valdez***, however, ignores this overwhelming

authority and sound policy. 2004 UT App 214, ¶¶ 6-11. It claims that whatever the merits of a strict timely objection rule, rule 18(c)(2), Utah Rules of Criminal Procedure, permits a ***Batson*** objection to be made after the jury selection process is completed and at any point before trial evidence is presented. ***See id.*** at ¶ 11. As explained below, that holding is incorrect.

B. Utah's Pre-*Valdez* Requirement that a *Batson* Objection Be Made During the Jury Selection Process.

Until ***Valdez***, Utah recognized that a ***Batson*** objection should be made during the jury selection process, that is, prior to the jury being sworn and the remainder of the venire excused.

In ***Salt Lake County v. Carlston***, 776 P.2d 653, 655-56 (Utah App. 1989), the Utah Court of Appeals fully embraced the policy behind the universal rule and refused to exempt a ***Batson*** objection from Utah's contemporaneous objection rule. Carlston failed to object during the jury selection process when the county used all of its peremptory challenges to remove three of four women on the jury. ***Id.*** at 654. Trial was completed the same day. ***Id.*** Two weeks later, Carlston filed a motion for new trial in which she claimed the county had exercised its peremptory strikes with discriminatory intent. ***Id.*** The trial court denied the motion. ***Id.***

On appeal, the court of appeals held that Carlston waived consideration of her ***Batson*** claim because she failed to timely object to the county's peremptory strikes. ***Carlston***, 776 P.2d at 655. ***Carlston*** noted that for an objection to be timely, it must be "presented to the

trial court in a manner sufficient to obtain a ruling thereon." ***Id.*** In the ***Batson*** context, this means before the trial jury is sworn and the remainder of the venire excused. ***Id.*** at 656. ***Carlston*** recognized that if ***Batson*** objections were delayed beyond the jury selection process, a defendant would be encouraged to "'sandbag[']the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten." ***Id.*** (quoting ***United States v. Forbes***, 816 F.2d 1006, 1011 (5th Cir. 1987)). ***Carlston*** further recognized that a ***Batson*** objection made during the jury selection process permits the trial court to easily remedy a discriminatory strike "'simply by seating the wrongfully struck venireperson. After trial, the only remedy is setting aside the conviction.'" ***Id.*** (quoting ***Forbes***, ***id.***). Allowing a ***Batson*** objection to be made after the venire is excused also adversely impacts the validity of the ***Batson*** ruling. If the remainder of the venire is no longer in the courtroom, the accused attorney is hindered in his ability to provide a full factual explanation for his strike and the trial court is hindered in its ability to fully assess the credibility of that explanation and enter informed findings. ***Id.*** at 656.

Valdez acknowledges ***Carlston***, but minimizes its significance by referring to its contemporaneous objection rule as "dicta." ***See Valdez***, 2004 UT App 214, ¶ 8. ***Carlston***'s time limitation for a ***Batson*** objection (before the jury is sworn and the remainder of the venire is excused) is not, however, advisory. To the contrary, ***Carlston*** recognized the "universal" rule requiring a ***Batson*** objection to be made during the jury selection process,

discussed the sound policy behind the rule, and then applied it to waive consideration of the merits of Carlston's ***Batson's*** objection. ***See Carlston***, 776 P.2d at 655-56.

Though this Court has not specifically addressed the time frame for a ***Batson*** objection, it has concluded that, in general, discriminatory jury selection claims must be raised before the jury is sworn.

Utah Code Ann. § 78-46-16(1) (West 2004) directs that any allegation that a jury was selected in violation of the Jury Selection Act must be raised as soon as discovered, but "in any event before the trial jury is sworn." ***See*** *Add. C.* Section 78-46-16 does not govern constitutionally-based challenges, such as ***Batson***. ***See State v. Tillman***, 750 P.2d 546, 574 n.115 (Utah 1987). Nevertheless, this Court has applied the statute's time limitation to both statutory and constitutionally-based jury discrimination claims.

Prior to ***Tillman***, this Court relied on section 78-46-16 in holding that a fair cross-section claim "must be lodged before the jury is sworn." ***State v. Bankhead,*** 727 P.2d 216, 217 (Utah 1986). After ***Tillman***, this Court likewise held that a constitutionally-based challenge based on jury disproportionality was timely because it was raised as soon as the grounds for the challenge became apparent and before the jury was sworn. ***Redd v. Negley***, 785 P.2d 1098, 1099-1100 (Utah 1989). Finally, in ***State v. Span***, 819 P.2d 329, 337 (Utah 1991), the State conceded on appeal that Span's ***Batson*** objection was timely because it was "made immediately after the peremptory challenges to the jurors were completed and before the jury was sworn." This Court summarily accepted that concession as consistent with the

time frames recognized in ***Bankhead***, section 78-48-16, and rule 18, Utah Rules of Criminal Procedure. ***Span***, 819 P.2d at 337.

Here, the court of appeals relied exclusively on rule 18 to find defendant's ***Batson*** objection timely. ***See Valdez***, 2004 UT App 214, ¶ 11. While rule 18 is consistent with the universal time limitation for a ***Batson*** objection, the rule is not controlling.

Rule 18 governs the jury selection process in criminal cases. Subsection (c)(2) of the rule states:

> A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented . . .

See *Add. C*. By its plain language, rule 18(c)(2) imposes the time limit for challenging the *retention of a juror*. The rule does not, however, control an objection to the *removal of a juror*. Nevertheless, like section 78-46-16, rule 18(c)(2)'s time frame—before the jury is sworn—is consistent with the universally-recognized time period for a ***Batson*** objection adopted in ***Carlston***.

Rule 18(c)(2) recognizes a good cause exception to its time requirement. A party, who fails to timely challenge an individual juror, may challenge that juror up until the trial evidence is presented, if the party establishes good cause for its delayed objection. ***See*** *Add. C.* In other words, the rule permits a party to challenge *the retention of a selected juror* up until the evidentiary stage of a trial, if the party establishes good cause for its failure to raise a challenge for-cause or to peremptorily strike the juror during the selection process. ***See***

Rule 18(c) (*Add. C*). Despite the limited scope of rule 18(c)(2), the court of appeals in this case erroneously concludes that rule 18's good cause exception permits consideration of defendant's otherwise untimely ***Batson*** challenge. ***See Valdez***, 2004 UT App ¶ 10.

Valdez cites ***State v. Harrison***, 805 P.2d 769 (Utah App.), *cert. denied*, 817 P.2d 327 (Utah 1991), in support of its good cause analysis. In ***Harrison***, a ***Batson*** objection was made "immediately after the jury was sworn in, *before the challenged jurors were excused from service*, and before opening statements of counsel," that is, during a time period when an improperly struck juror could be easily reinstated. ***See Harrison***, 805 P.2d at 776 (emphasis added). The ***Harrison*** panel concluded that section 78-36-16's time period was not controlling. ***Id.*** at 776 (citing ***Tillman***, 750 P.2d at 574 n.115). Sua sponte, the panel then considered rule 18's time frame and summarily concluded that though Harrison's objection was untimely (made after the jury was sworn), its merits could nevertheless be considered pursuant to rule 18's good cause exception because it was made "before the challenged jurors were excused from service" and before any trial evidence was presented. ***Id.*** at 776.

In applying rule 18 to a ***Batson*** objection, ***Harrison*** did not acknowledge ***Carlston*** or any other ***Batson***-based authority. Nevertheless, because the remainder of the venire was still in the courtroom and had not been dismissed when Harrison made his ***Batson*** objection, the ***Harrison*** decision does not contradict the universal rule and ***Carlston***'s time limitation.

Valdez fails to recognize this distinction. Instead, ***Valdez*** concludes that ***Harrison*** and rule 18 permit a ***Batson*** objection to be made "before any of the evidence is presented,"

regardless of whether the trial jury was sworn and the remainder of the venire dismissed. ***See*** 2004 UT App 214, ¶ 11. No Utah case or decision from any other jurisdiction has gone this far in permitting a ***Batson*** objection. ***See*** *discussion, supra.*

Contrary to ***Valdez***, the time requirement recognized in ***Carlston***—before the jury is sworn and the venire dismissed—is not a new rule or a modification of rule 18. ***See Valdez***, 2004 UT App 214, ¶ 11. Over twenty years of jurisprudence establishes that a ***Batson*** objection must be timely raised or waived and that, in the context of ***Batson*** and Utah procedure, a timely ***Batson*** objection is one made during the jury selection process, that is, before the jury is sworn. But even if good cause permits extension of this period, the objection must still be made during the jury selection process, that is, at the outside, before the remainder of the venire is excused.

C. *Valdez*'s Erroneous Conclusion that Good Cause Excused Defendant's Untimely *Batson* Objection.

Even assuming arguendo rule 18 and its good cause exception controlled ***Batson*** objections, here no good cause excused defendant's untimely objection. ***See In re Rights to the Use of Water***, 2004 UT 106, ¶ 43, 515 Utah Adv. Rep. 12 (recognizing that "[g]ood cause occurs when special circumstances essentially beyond a party's control excuse the late" action and "justify suspending a strict application of a [ ] deadline").

In this case, it was self-evident that the prosecutor used all his peremptory strikes against women (R. 94). Yet, defendant made no objection when the strikes were made, made no objection when the selected jurors were announced, made no objection when the trial jury

was sworn, made no objection when the remainder of the venire was dismissed, made no objection when the sworn jurors were excused for lunch, and made no objection during a subsequent in-chambers conference until the court casually asked the parties if there was anything else to discuss before they recessed for lunch (R209: 78) (*Add. D*). Only then did defendant summarily raise a ***Batson*** objection (id.). ***See*** *Point II.* And when the prosecutor responded that the ***Batson*** objection was not timely, defendant did not claim that it was timely or that good cause justified its untimeliness. He simply remained silent (R209: 78-80) (*Add. D*). The trial court then asked the prosecutor, "Well not withstanding that, can you give me a basis to rebut the ***Batson*** type challenge?" (R209: 79).

Contrary to ***Valdez***, the trial court's question does not constitute an implicit finding of good cause. ***See*** 2004 UT App 214, ¶ 10. The request simply suggests that despite the untimeliness of defendant's objection, the trial court believed it was best to make a record of the merits. ***Accord State v. Alvarez***, 872 P.2d 450, 458 n.8 (Utah 1994) (noting trial court considered the merits of the *Batson* claim as a cautionary measure and to "complete [the] record").

Even if the trial court's question is viewed as an implicit finding of good cause, such a finding would constitute an abuse of discretion here because defendant did not claim that good cause excused his untimely objection and good cause is not otherwise apparent on the record. ***Compare Garcia***, 102 F.3d at 759 (concluding that sound policy bars appellate review of an untimely objection, even when the trial court considers its merits), ***Richardson v. McGriff***, 762 A.2d 48, 63-64 (Md. App. 2000) (recognizing that substantial policy reasons

bar appellate consideration of a ***Batson*** objection made after the jury is sworn and venire dismissed, even when the trial court fully considers the merits), ***with State v. Belgard***, 830 P.2d 264, 266 (Utah 1992) (finding no policy concerns barred appellate consideration of an untimely motion to suppress, which was fully considered in an evidentiary hearing below); ***and State v. Johnson***, 821 P.2d 1150, 1160 (Utah 1991) (recognizing that when the merits of an evidentiary ruling are considered in a post-verdict hearing, the only policy concern is whether the trial court had an adequate opportunity to fully review the claim).

Defense counsel's statement, "I noticed that when we were doing the jury selection that the State struck all women . . . " (R209: 78), suggests that he was fully aware of the suspect pattern of strikes during jury selection, but waited to raise his ***Batson*** claim until after the remainder of the venire was excused. At that point, no prompt corrective action could be taken, even if the trial court had found a violation. The only remedy was mistrial—or given ***Batson***'s automatic reversal rule, the possibility of reversal on appeal. ***See Carlston***, 776 P.2d at 656 (recognizing that a delayed ***Batson*** objection allows a defendant to "sandbag" the prosecution). ***See also McCrory***, 82 F.3d at 1247 (recognizing that a delayed ***Batson*** objection permits a defendant to "manipulate the system to the extreme prejudice of the prosecution" by planting automatic reversal error).

In sum, defendant's ***Batson***'s objection was untimely and consideration of its merits waived. This Court should reverse Part I of the *Valdez* opinion, vacate Parts II-IV of the opinion as dicta, reinstate defendant's convictions, and remand to the court of appeals for consideration only of defendant's remaining evidentiary claim (admission of BWS evidence).

POINT II

VALDEZ FAILED TO APPLY THE ***BATSON*** STANDARDS AND ANALYSIS ESTABLISHED BY THIS COURT AND THE UNITED STATES SUPREME COURT

Should this Court conclude that defendant's ***Batson*** objection was untimely and consideration of its merits waived, ***see*** *Point I,* it should nevertheless clarify what constitutes proper ***Batson*** analysis and standards and vacate Parts II-IV of the ***Valdez*** opinion. ***See Span***, 819 P.2d at 340 (clarifying ***Batson***'s "cognizable minority group" requirement, even though the issue was not determinative of the outcome of the appeal). If defendant's objection is timely and its merits fully reviewed, this Court should reverse Parts II-IV of the ***Valdez*** opinion, affirm the trial court's finding of no discriminatory intent, and reinstate defendant's convictions. In either case, the appeal should then be remanded to the court of appeals for determination of defendant's remaining evidentiary claim (BWS evidence).

Valdez confuses and contradicts established ***Batson*** law. ***Valdez*** fails to consider the merits of the trial court's ultimate finding of no discriminatory intent. ***See*** 2004 UT App 214, ¶ 17 n.2. It also fails to apply established standards of review, impermissibly combines distinct analytical steps, and erroneously equates a non-discriminatory explanation for a peremptory strike with the bias requirement of a for-cause challenge. ***See id.*** at ¶¶ 13, 17, 21-25 & 29. The flawed analysis in ***Valdez*** inevitably leads to its erroneous conclusion that the trial court abused its discretion in not "outright" rejecting the prosecutor's explanations for his strikes. ***See id.*** at ¶¶ 30-31.

A. ***Batson*'s Incorporation of General Equal Protection Analysis.**

Batson is based on "the general equal protection principle that the 'invidious quality' of governmental action claimed to be [ ] discriminatory 'must ultimately be traced to a [ ] discriminatory purpose.'" ***Batson***, 476 U.S. at 93 (quoting ***Washington v. Davis***, 426 U.S. 229 (1976)). ***Batson***'s three step analytical procedure is identical to that found in employment discrimination cases. ***Compare Batson,*** 476 U.S. at 93-98, ***with Texas Department of Community Affairs v. Burdine***, 450 U.S. 248, 253-58 (1985) (cited with approval in ***Batson***, 476 U.S. at 94 n.18 & 98 n.20). ***Compare also Colwell***, 2000 UT 8, ¶¶ 18-22, ***with University of Utah v. Industrial Commission of Utah***, 736 P.2d 630, 634-65 (Utah 1987); ***and Shekh v. Department of Public Safety***, 904 P.2d 1103, 1105-1106 (Utah App. 1995).

Consequently, in a ***Batson*** case, "[a]s in any equal protection case, the burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." ***Batson***, 476 U.S. at 93 (citation and internal quotation marks omitted). ***See also Burdine***, 450 U.S. at 253. Defendant, as the party alleging discrimination, must initially make a prima facie showing that the strike was made for a discriminatory purpose (step one). This requires, as it does in any equal protection case, that defendant show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." ***Batson***, 476 U.S. at 93-94. ***See also Burdine***, 450 U.S. at 253-54

"Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately" the strike (step two). ***Batson***, 476 U.S. at 94. ***See also Burdine***, 450

U.S. at 253. More than a general denial is required: "[T]he State must demonstrate that permissible [ ] neutral selection criteria and procedures have produced the monochromatic result." ***Batson***, 476 U.S. at 94 (citations and internal quotation marks omitted). ***See also Burdine***, 450 U.S. at 254-55. If a neutral explanation is provided, the trial court must evaluate the explanation and determine, based on the totality of the circumstances, if defendant has carried his burden of establishing purposeful discrimination (step three). ***Purkett***, 514 U.S. at 767. ***See also Burdine***, 450 U.S. at 256. ***Accord J.E.B.***, 511 U.S. at 144-45; ***Higginbotham***, 917 P.2d at 547.

Batson's analytical steps—and ***Valdez***'s errors in interpreting and applying them—are more fully discussed below.

B. Step One: The Prima Facie Showing.

Batson's first step requires the opponent of a peremptory strike (here defendant) to make a prima facie showing that the prosecutor exercised the strike with purposeful discrimination. ***See Batson***, 476 U.S. at 94 Step one's purpose is to eliminate "the most common nondiscriminatory reasons" for a strike. ***See Burdine***, 450 U. S. at 254. In other words, the prima facie showing separates "meritless claims of discrimination from those that have merit." ***Alvarez***, 872 P.2d at 455 (citation and internal quotation marks omitted).

To establish a prima facie showing of purposeful discrimination, defendant must demonstrate that the totality of the relevant facts surrounding the challenged strike gives rise to an inference of discriminatory purpose. ***See Batson***, 476 U.S. at 93-94; ***J.E.B.***, 511 U.S. at 144-45; ***Colwell***, 2000 UT 8, ¶ 18; ***Alvarez***, 872 P.2d at 455. That is, if the facts alleged

by defendant are believed, they are sufficient to support a finding that the strike was exercised solely for a discriminatory purpose. ***See J.E.B.***, 511 U.S. at 143; ***Batson***, 476 U.S at 89 & 98. ***See also Burdine***, 450 U.S. at 254. This requires "more than simply showing that one or more minority jurors were peremptorily stricken." ***Harrison***, 805 P.2d at 777. ***Accord Colwell***, 2000 UT 8, ¶ 18; ***Alvarez***, 872 P.2d at 457-58. Instead, the prima facie showing must be based on "as complete a record as possible" and establish "a strong likelihood" that discrimination occurred.[3] ***See Alvarez, id.***

Here, the sufficiency of defendant's prima facie showing is not at issue because the prosecutor did not challenge it below (R209: 79-80). ***See Hernandez***, 500 U.S. at 359; ***Colwell***, 2000 UT 8, ¶ 18; ***Higginbotham***, 917 P.2d at 547. ***See also Valdez***, 2004 UT App 214, ¶ 20. Nevertheless, ***Valdez*** commits err in its step one analysis.

Valdez fails to recognize that the weakness or strength of the prima facie showing, even when not challenged in step one, remains relevant for step three. ***See*** 2004 UT App 214, ¶ 20. In step three, the trial court must consider all relevant facts—including the weakness or strength of the prima facie showing—in determining whether defendant has carried his burden to prove that the strike was exercised solely for a discriminatory purpose. ***See Hernandez***, 500 U.S. at 369-70. ***See also Burdine***, 450 U.S. at 255-56; ***University of Utah***, 736 P.2d at 6334-35.

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[3]In employment discrimination cases, the prima facie showing must be established by a preponderance of the evidence. ***See Burdine***, 450 U.S. at 252-53; ***University of Utah***, 736 P.2d at 635.

Here, defendant's prima facie showing, though uncontested, was weak. Defendant claimed only that the prosecutor used four of four (100%) peremptory strikes against women (R209: 78). The figure is meaningless without context. ***See Colwell***, 2000 UT 8, ¶ 18; ***Alvarez***, 872 P.2d at 455-58; ***State v. Shepard***, 1999 UT App 305, ¶ 30, 989 P.2d 503.

The original venire originally consisted of 25 people, 14 of whom were women (14/25 or 56%). Three women were removed for cause—one over the objection of the prosecutor (R. 94; R209: 66-69). The prosecutor used four peremptory challenges (4/4 or 100%) to remove four of the remaining eleven women from the jury (4/11 or 36%) (id.). Defendant, in turn, used four peremptory challenges (4/4 or 100%) to remove four of eight men (4/8 or 50%) (id.). The selected jury consisted of four men (50%) and four women (50%) (id.). Consequently, though the prosecutor used 100% of his strikes against women, the strikes only reduced the percentage of women jurors from 56% of the original venire to 50% of the selected jury. This modest change in the overall composition of the jury does not alone establish evidence of discriminatory intent. ***See Harrison***, 805 P.2d at 777. ***See also 5 Crim. Proc.*** *at 326-27* (noting that a prima facie case is rarely established where the percentage of jurors alleged to be improperly struck is less than the percentage of the group remaining on the jury). ***But see State v. Pharris***, 846 P.2d 454, 464 (Utah App.) (recognizing that "the improper dismissal of even one venireman is intolerable"), *cert. denied*, 857 P.2d 948 (Utah 1993).

In sum, in this case, the prosecutor waived any objection to the sufficiency of the primary showing. Nevertheless, the strength or weakness of defendant's prima facie showing remains relevant to the ultimate ***Batson*** inquiry.

C. Step Two: The Neutral Explanation.

Once a prima showing is made, the proponent of the strike (here the prosecutor) must provide a facially neutral explanation for the challenged strike (step two). ***See Purkett***, 514 U.S. at 768; ***J.E.B.***, 511 U.S. at 144-45; ***Batson***, 476 U.S. at 97-98; ***Higginbotham***, 917 P.2d at 548. The explanation must raise a "genuine issue of fact" as to whether the challenged strike was exercised with discriminatory intent. ***See Burdine***, 450 U.S. at 255. ***See also Purkett***, 514 U.S. at 768-69. In this way, step two's explanation frames the factual issue which will ultimately be resolved by the trial court in step three. ***See Burdine***, 450 U.S. at 255.

Step two is purely a matter of production. ***See Purkett***, 514 U.S. at 767. The prosecutor must provide "an explanation based on something other that the race [or gender] of a juror." ***Hernandez***, 500 U.S. at 360. As with any peremptory strike, the reason should be "related to [the prosecutor's] view concerning the outcome of the case to be tried." ***Batson***, 476 U.S. at 89. But because the explanation must create a "genuine issue of fact," a general denial of discriminatory purpose is insufficient. ***See Burdine***, 450 U.S. at 254. Instead, the prosecutor's "explanation of [his] legitimate reasons must be clear and reasonably specific." ***Burdine***, 450 U.S. at 258 (quoted with approval in ***Batson***, 476 U.S. at 98 n.20, and ***Purkett***, 514 U.S. at 768). In step two, however, the explanation need not be

persuasive or even plausible. ***See Purkett***, 514 U.S. at 768; ***Batson***, 476 U.S. at 97. Instead, the credibility and validity of the explanation are the exclusive province of step three (the trial court's ultimate determination), where

> implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the [ ] neutral reason is silly or superstitions. The latter violates the principle that the ultimate burden of persuasion regarding [discriminatory] motivation rests and never shifts from the opponent of the strike.

Purkett, 514 U.S. at 768 (emphasis in original). ***Accord Colwell***, 2000 UT 8, ¶ 22; ***Higginbotham***, 917 P.2d at 548. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason will be deemed [] neutral." ***Purkett***, 514 U.S. at 769.

"Placing this burden of production on [the prosecutor] thus serves simultaneously to meet the [defendant's] prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the [defendant] will have a full and fair oppor tunity to demonstrate pretext." ***Burdine***. at 255. Once a facially neutral explanation is given, the burden shifts back to defendant to proved that the prosecutor's reasons "were not [his] true reasons, but rather a pretext for discrimination." ***See University of Utah***, 736 P.2d at 635. This "allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." ***Burdine***, 450 U.S. at 255 n.8. ***Accord Purkett***, 514 U.S. at 767-69.

(1) Requirements for a Neutral Explanation.

Contrary to the authorities discussed above, ***Valdez*** holds that step two requires that the prosecutor's explanation be "(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate." ***See*** 2004 UT App 214, ¶ 21 (quoting ***State v. Cannon***, 2002 UT App 18, ¶ 9, 41 P.3d 1153). The court of appeals erroneously treats these components as factors to be weighed by the trial court, whereas they are simply general descriptions of the type of explanation needed.[4] ***Compare Valdez*** at ¶ 21-25 & 27, ***with Purkett***, 514 U.S. at 768-69, ***and Burdine***, 450 U.S. at 255-58. Indeed, ***Batson*** used the terms "clear" and "legitimate," not as weighed factors, but simply to "refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." ***Purkett***, 514 U.S. at 769.

In effect, ***Valdez*** impermissibly grafts step three factors onto step two. ***See*** *discussion of step three, infra.* This is the very error condemned by the United States Supreme Court in ***Purkett***, 514 U.S. at 767-69, and ***Burdine***, 450 U.S. at 254-58, and by this Court in ***University of Utah***, 736 P.2d at 634-35. Both Courts made clear that in an equal protection claim, the proponent of the challenged action "need only produce [ ] evidence which would allow the [court] rationally to conclude that the [challenged] decision had not been motivated by discriminatory animus." ***See Burdine***, 450 U.S. at 257. ***See also Hernandez***, 500 U.S. at 359 (recognizing that a "discriminatory purpose . . . implies that the decisionmaker

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[4]This error is not unique to ***Valdez***, but occurs in other court of appeals decisions. ***See, e.g., Cannon***, 2002 UT App 18, ¶ 9; ***State v. Chatwin***, 2002 UT App 363, ¶ 7, 58 P.3d 867, *cert. denied*, 67 P.3d 495 (Utah 2003).

selected a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group") (citation and internal quotation marks omitted). In other words, the prosecutor's burden of production in step two is satisfied if he "simply explains what he has done or produces evidence of a legitimate nondiscriminatory reasons" for his strikes. ***See Burdine***, 450 U.S. at 256-57 (in context of employment discrimination).

In ***Valdez***, the court of appeals recognizes that the prosecutor's explanations are facially neutral, but then rejects them because they are "hardly clear, concise, or reasonably specific. . . [and] offered nothing more than vague and generic descriptions of the jurors that anyone could concede are nondiscriminatory, but which do not appear to have anything to do with the jurors themselves." 2004 UT App 214, ¶¶ 27-29. As will be discussed, this assessment is erroneous.

(2) The Neutrality of the Explanations in This Case.

Contrary to ***Valdez***, the record establishes that the prosecutor's explanations were reasonably specific, clear, and non-discriminatory. ***See*** 2004 UT App 214, ¶¶ 26-29. They were, therefore, adequate to meet step 2's burden of production.

The prosecutor struck Valerio based on her employment in a non-profit agency (R209: 14-16, 79). He struck Gonzalez based on her claimed prior knowledge of the case (R209: 18-19, 65-66, 79). He struck Morley because he believed that her job, like Valerio's, might render her overly compassionate and because the next juror had experiences and training, which the prosecutor preferred (R209: 27-30, 45-46, 79-80). None of the explanations implicated gender and, consequently, none were inherently discriminatory. ***See, e.g.,***

Hernandez, 500 U.S. at 370; ***United States v. Moreno***, 878 F.2d 817, 820 (5th Cir.), *cert. denied*, 498 U.S. 924 (1999); ***Macial***, 854 P.2d at 546-47; ***State v. Williams***, 545 So.2d 651, 653-54 (La. App. 1989) (all upholding the neutrality of strikes based on a juror's appearance, demeanor, reactions, or attitudes). ***See also J.E.B.***, 511 U.S. at 142 n.14 & 143 n.16; ***United States v. Johnson***, 905 F.2d 222, 223 (8th Cir.), *cert. denied*, 498 U.S. 979 (1989); ***United States v. Tindle***, 860 F.2d 125, 129 (4th Cir. 1988), *cert. denied*, 490 U.S. 114 (1989) (all upholding the neutrality of strikes based on a juror's employment, occupation, military affiliation, or other associations). ***See 5 Crim. Procedure*** *at 329-33 (main text) & at 94-95 (supp.).*

The prosecutor struck Thornton based on her prior jury service and the presumptively reduced verdict of manslaughter she had returned in that case (R209: 14, 34, 49-50, 79). According to ***Valdez***, the prosecutor's explanation is "unrelated to the case at hand." 2004 UT App 214, ¶ 28. The court asserts that "manslaughter has nothing to do with the present case" and that Thornton's participation in another criminal case "does not undermine her ability to be impartial in the present case." ***Id.*** This misinterprets the requirement of specificity in step two. Regardless of the nature of the cases involved, prior jury service is a facially neutral and ultimately legitimate reason to strike a juror. ***See 5 Crim. Procedure*** *at 328-34*. ***See also United States v. Contreras-Contreras***, 83 F.3d 1103, 1105 (9th Cir. 1995). Additionally, the non-discriminatory explanation for a peremptory strike does not need to "rise to the level justifying exercise of a challenge for cause." ***See Colwell***, 2000 UT 8, ¶ 22. ***See also Batson***, 476 U.S. at 97; ***Purkett***, 514 U.S. at 768-89 (same).

In sum, ***Valdez*** erred in rejecting the prosecutor's non-discriminatory explanations "outright" and in failing to advance to step three of its ***Batson*** analysis.[5]

D. Step Three: The Factual Finding of Discriminatory Intent.

Step three of ***Batson*** analysis requires the trial court to determine if defendant has proven purposeful discrimination, i.e., that the prosecutor exercised the challenged strike solely for a discriminatory reason. ***See Batson***, 476 U.S. at 98; ***Higginbotham***, 917 P.2d at 548. ***See also Burdine***, 450 U.S. at 255-58. In this final step, the trial court must determine if the prosecutor's "explanation for a peremptory challenge should be believed." ***See Hernandez***, 500 U.S. at 365. Even in step three, however, the issue is not whether the explanation is in fact true, but whether the reason given for the strike is a pretext to disguise an impermissible discriminatory motive. ***See Higginbotham***, 917 P.2d at 549 n.3. Consequently, even if the prosecutor is mistaken in fact in his explanation, defendant cannot prevail in his ***Batson*** objection unless he establishes that the prosecutor's motive was in fact discriminatory. ***See Higginbotham, id.***

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[5] ***Valdez*** may erred in applying an abuse of discretion standard for steps one and two. ***See*** 2004 UT App 214, ¶¶ 14-17. Viewing the two steps as "reciprocals," the court adopted the standard based on ***Alvarez***, 872 P.2d at 456 (reviewing step one for abuse of discretion). ***See*** 2004 UT App 214, ¶¶ 15 & 17. The standard is questionable, however, because a prima facie showing is normally treated as a question of law. ***See Bair v. Axiom Design***, 2001 UT 20, ¶ 13, 20 P.3d 388. Similarly, whether an explanation is inherently discriminatory is viewed as a question of law. ***See Hernandez***, 500 U.S. at 359; ***State v. Jensen***, 2003 UT App 273, ¶ 15, 76 P.3d 188.

Only in step three does "the persuasiveness of the [prosecutor's] justification become [ ] relevant." ***Purkett***, 514 U.S. at 768. In step two, an implausible, but facially non-discriminatory reasons is sufficient because the prosecutor bears no burden of persuasion. ***Id. See also Burdine***, 450 U.S. at 257-58. In step three, however, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." ***Purkett***, 514 U.S. at 768. ***Accord Colwell***, 2000 UT 8, ¶ 22; ***Higginbotham***, 917 P.2d at 548.

In step three, the trial judge must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ***Batson***, 476 U.S. at 93. The "totality of the circumstances" surrounding the exercise of the peremptory strikes should also be considered. ***See Hernandez***, 500 U.S. at 363. Factors that may bear on the validity and credibility of the explanation include: "(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged." ***State v. Cantu***, 788 P.2d 517, 518-19 (Utah 1989). Often, however, the trial court's assessment may be based on "little evidence" other than the credibility of the prosecutor. ***See Miller-El v. Cockrell***, 537 U.S.322, 340 (2003) (reaffirming that "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis [and] once that had been settled, there seems nothing left [for an appellate] court to review").

Valdez never reviewed the trial court's finding of no discriminatory intent (step three) because it prematurely terminated its analysis with step two. ***See*** 2002 UT App 214, ¶ 17 n.2. If *Valdez* had proceeded to step three, it would had been obligated to defer to the trial court's ruling unless clearly erroneous. ***See Colwell***, 2000 UT 8, ¶ 20. Here, the trial court's ultimate finding of no discriminatory intent is fully supported by the record and, consequently, entitled to affirmance on appeal. ***See Hernandez***, 500 U.S. at 369 (recognizing that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous") (citation and internal quotation marks omitted).

By the time defendant made his ***Batson*** objection, the jury process was completed. The stricken jurors had been excused and were no longer in the courtroom (R209: 70, 78-80). The prosecutor and the trial court, therefore, had to rely primarily on their memories of the venire and the voir dire examination. The prosecutor had some notes, but he found several unreadable (R209: 80). Additionally, due to the delay, the prosecutor no longer remembered every detail of the four jurors or their responses in voir dire (R209: 79-80).[6] Nevertheless, he clearly remembered his primary reasons for striking them. He struck Valerio because he felt her employment might make her "overly compassionate." He struck Gonzalez because he did not like the tone and manner of her responses regarding her knowledge of the case.

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[6] He could not remember Thornton's specific pretrial knowledge of the case (R209: 79). He also did not remember that Morley was a Title-I teacher's aide in addition to a piano teacher (R209: 80). He may have been confused about what magazines Morley read (R209: 79).

He struck Thornton because she had previously served on a jury, which had returned a verdict of manslaughter. He struck Morley because he felt her employment, like Valerio's, would make her more inclined to "let bygones be bygones;" he also preferred the next juror who was a Vietnam veteran, hunter, and familiar with firearms. ***See*** R209: 79-80 (*Add. D*).

The prosecutor's reasons related to facts gleaned through voir dire. The reasons were unique to the stricken jurors and did not apply to the seated jurors. None of the seated jurors were employed by a nonprofit agency, taught school under a Title-I grant, or taught piano at home as did stricken jurors Valerio and Morley. Only one member of the seated jury (Curtis) had heard of the case (R. 94; R209: 34-35, 61-62). But unlike stricken juror Gonzalez who related incorrect information, Curtis's information was correct. And unlike Gonzalez, who only "thought" she could set aside outside information, Curtis viewed herself as a "professional" and said she would "absolutely" judge the case only on the trial evidence (R209: 60-61). None of the seated jurors had previously served on a jury and none had rendered a reduced verdict in a criminal case, both of which Thornton had. ***See*** *Add. E.*

The trial court found the prosecutor's explanations reasonably specific, legitimate, and credible (R209: 80). ***See State v. Ramirez***, 817 P.2d 774, 787 n.6 (Utah 1991) (recognizing facts implicit in the lower court's ruling). This finding was reasonable in light of the weakness of defendant's prima facie showing, the detail and candor of the prosecutor's explanations, the prosecutor's objection to the removal of one woman juror for cause (R209: 66-69), and the trial court's first-hand observations of the jurors and their responses in voir

dire. It was reasonable in light of defendant's failure to challenge the prosecutor's stated reasons for the strike.

Defendant's failure to attack the prosecutor's explanations below waives his right to challenge the validity of those explanations for the first time on appeal. ***See Carlston***, 776 P.2d at 655. *Valdez* disagrees and holds that defendant has no duty to "renew" his ***Batson*** objection beyond his initial objection by further objecting once the prosecutor provided his explanations for the strikes. ***See*** 2004 UT App 214, ¶ 13. This is incorrect. Once a neutral explanation is tendered, defendant, as the party claiming discriminatory intent, bears the burden of ultimately rebutting the explanation by disproving its validity. ***See Burdine***, 450 U.S. at 255-56; ***University of Utah***, 736 P.2d at 625. ***See also 5 Crim. Procedure*** *at 329* (citing cases holding that a defendant must attack the prosecutor's explanation); ***State v. Owen***, 935 P.2d 183, 196 (Idaho App. 1997) (refusing to consider whether explanations were pretextual where defendant did not attack them below).

Sound policy supports this requirement. Jury selection is subjective and the reasons for striking a juror are highly personal. ***See State v. Litherland***, 2000 UT 76, ¶¶ 20-21, 12 P.3d 92 (recognizing that jury selection "more art than science"). Yet, if a ***Batson*** objection is successful in the trial court, it will result in the immediate reinstatement of the improperly struck juror or the possible replacement of the entire venire. ***See Batson***, 476 U.S. at 99 n.24. Even when a party suspects an opponent's strike, he may opt *not* to raise a ***Batson*** objection if he does not want the stricken juror to be reinstated or is otherwise satisfied with the jury venire. ***See Litherland, id.*** Similarly, a party may initially raise a ***Batson*** objection,

as defendant did here, but then choose to abandon it once the prosecutor provides obviously neutral explanations for the strike. ***Id.***

In this case, defendant's silence after the prosecutor explained the strikes reasonably suggests his acceptance of the explanations' neutrality. ***Valdez***, 2004 UT App 214, ¶ 13, erred in considering defendant's challenge to those explanations for the first time on appeal. ***See McCardel***, 652 P.2d at 947 (recognizing that a failure to object below waives consideration of the merits of an issue).

In sum, defendant failed to carry his burden of proving discriminatory intent and, consequently, his ***Batson*** objection was properly denied by the trial court.

CONCLUSION

For these reasons, ***Valdez*** should be reversed, defendant's convictions should be reinstated, and the case remanded to the court of appeals with directions to review only defendant's remaining evidentiary claim concerning the admissibility of Battered Woman Syndrome evidence.

RESPECTFULLY SUBMITTED this 14th day of March, 2005.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Plaintiff/Petitioner were mailed to Lori J. Seppi, Salt Lake Legal Defender Association, attorneys for Defendant/Respondent, 424 East 500 South, Suite 300, Salt Lake City, UT, 84111 this 14th day of March, 2005.

Addenda

Addendum A

95 P 3d 291
95 P 3d 291, 502 Utah Adv Rep 38, 2004 UT App 214
(Cite as: 95 P.3d 291, 2004 UT App 214)

Court of Appeals of Utah
STATE of Utah, Plaintiff and Appellee,
v
Anthony James VALDEZ, Defendant and Appellant
No 20030089-CA

June 24, 2004

Background Defendant was convicted in the District Court, Third District, Salt Lake Department, Judith S Atherton, J , of aggravated burglary, possession of a dangerous weapon by a restricted person, and criminal mischief Defendant appealed

Holdings The Court of Appeals, Jackson, J , held that
(1) defendant's alleged failure to timely present *Batson* challenge did not prevent district court from addressing challenge or result in waiver,
(2) defendant's objections to state's use of peremptory challenges preserved *Batson* claim for appeal, although he did not challenge validity of prosecutor's explanations,
(3) Court of Appeals reviewed trial court's determination for abuse of discretion, and
(4) prosecutor failed to articulate legitimate, nondiscriminatory reasons for using peremptory challenges to strike only women
Reversed and remanded

West Headnotes

[1] Jury 117
230k117
Defendant's alleged failure to timely present *Batson* challenge by failing to raise it until after the venire had been dismissed, the jury had been sworn in, and the court preliminarily instructed the jury did not prevent district court from addressing challenge or result in waiver, rather, court impliedly found good cause to allow challenge to state's peremptory strikes beyond usual limits by ignoring state's timeliness argument and requiring the parties to proceed directly to arguments on the merits U S C A Const Amend 14, Rules Crim Proc , Rule 18(c)(2)

[2] Jury 117
230k117
Under *Batson*, a challenge to a peremptory strike must be timely U S C A Const Amend 14

[3] Criminal Law 1028
110k1028
Issues not raised in the trial court in timely fashion are deemed waived, precluding the appellate court from considering their merits on appeal

[4] Criminal Law 1035(5)
110k1035(5)
What constitutes a timely challenge under *Batson* depends entirely upon local procedures, but only firmly established and regularly followed state procedure may be interposed by a State to prevent subsequent appellate review of the important constitutional claim U S C A Const Amend 14

[5] Jury 117
230k117
A district court may consider a defendant's *Batson* challenge beyond the dismissal of the venire, even if it has made no specific finding of good cause, so long as it allows counsel to proceed with their *Batson* arguments, the district court impliedly finds good cause to consider the constitutional claim U S C A Const Amend 14, Rules Crim Proc , Rule 18(c)(2)

[6] Criminal Law 1035(5)
110k1035(5)
Court of Appeals could not prevent appellate review of defendant's *Batson* claim due to lack of timeliness even if court agreed that *Batson* challenges were prohibited after the venire has been dismissed and the jury has been sworn, as proposed rule was not firmly established and regularly followed state procedure U S C A Const Amend 14, Rules Crim Proc , Rule 18(c)(2)

[7] Criminal Law 1035(5)
110k1035(5)
Defendant's objections to state's use of peremptory challenges preserved *Batson* claim for appeal, although he did not challenge the validity of the prosecutor's explanations for the strikes U S C A Const Amend 14

[8] Criminal Law 1030(1)

110k1030(1)
To ensure the trial court's opportunity to consider an issue, appellate review of criminal cases in Utah requires that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record

[9] Criminal Law ⚿1043(1)
110k1043(1)
In Utah, there is no clear rule requiring a defendant to renew a *Batson* objection or to object specifically to the state's offered explanations, rather, Utah courts do not require a party to continue to object once a motion has been made, and the trial court has rendered a decision on the issue U S C A Const Amend 14

[10] Criminal Law ⚿1152(2)
110k1152(2)
Court of Appeals considered defendant's *Batson* challenge one of discretion with the trial court and reviewed trial court's determination for abuse of that discretion, issue of whether the prosecutor offered a legitimate, nondiscriminatory reason for peremptory strikes was less like a factual issue, because the trial court did not weigh evidence, but instead looked to the face of the state's explanations U S C A Const Amend 14

[11] Jury ⚿33(5 15)
230k33(5 15)
The first step of the tripartite process for determining whether the prosecution has engaged in prohibited discrimination in the jury selection process requires that a defendant challenging the prosecutor's use of a peremptory challenge present a prima facie case of discrimination

[12] Criminal Law ⚿1152(2)
110k1152(2)
A trial court's determination that a defendant has presented a prima facie case of discrimination in jury selection is a matter of some discretion on the part of the trial court, and will only be reversed if the trial court has abused its discretion

[13] Criminal Law ⚿1152(2)
110k1152(2)
The Court of Appeals allows the trial court discretion in making the determination whether, in the context of the specific case, a defendant has presented a prima facie case of discrimination in jury selection

[14] Jury ⚿33(5 15)
230k33(5 15)
The third step of the tripartite process for determining whether the prosecution engaged in prohibited discrimination during the jury selection process requires the trial court to weigh the evidence and look beyond the explanation, if possible, to determine whether the strike was purposefully discriminatory

[15] Criminal Law ⚿1158(3)
110k1158(3)
The trial court's actions in weighing the evidence and looking beyond the explanation for a peremptory strike during jury selection to determine whether the strike was purposefully discriminatory is intensely factual, and thus is reviewed for clear error

[16] Jury ⚿33(5 15)
230k33(5 15)
Pursuant to *Batson*, Utah courts apply a three-step test to determine whether the prosecutor has engaged in prohibited discrimination during the jury selection process, this test equally applies in cases of gender discrimination U S C A Const Amend 14

[17] Jury ⚿33(5 15)
230k33(5 15)
Under the second step of the three-step test to determine whether, pursuant to *Batson*, the prosecutor has engaged in prohibited discrimination during the jury selection process, even suspect explanations must be deemed facially valid unless they are inherently discriminatory U S C A Const Amend 14

[18] Jury ⚿33(5 15)
230k33(5 15)
Although the *Batson* challenge step requiring the prosecutor to give an explanation following a prima facie case of discrimination does not demand an explanation that is persuasive, or even plausible, it does require the proponent of the peremptory challenge to come forward with a neutral explanation for the challenge U S C A Const Amend 14

[19] Jury ⚿33(5 15)
230k33(5 15)

Under *Batson*, the reason for a peremptory strike must be related to the case being tried U S C A Const Amend 14

[20] Jury ⚿33(5 15)
230k33(5 15)
Under *Batson*, the reason for a peremptory strike must be clear and reasonably specific U S C A Const Amend 14

[21] Jury ⚿33(5 15)
230k33(5 15)
Under *Batson*, a prosecutor is required to articulate a neutral explanation related to the particular case, giving a clear, concise and reasonably specific legitimate explanation for excusing those jurors, there must also be support in the record for such an explanation U S C A Const Amend 14

[22] Jury ⚿33(5 15)
230k33(5 15)
Prosecutor failed to articulate legitimate, nondiscriminatory reasons for using peremptory challenges to strike only women, state did not provide any basis for explanations that some jurors were "overly compassionate" or "matter of fact," state cited vague nondiscriminatory motives without tying motives to jurors themselves, and some of state's explanations were unrelated to case at hand U S C A Const Amend 14

[23] Jury ⚿33(5 15)
230k33(5 15)
In order to survive a *Batson* challenge, it is not enough for the prosecutor simply to describe a nondiscriminatory motive without tying it to something specific about the juror herself U S C A Const Amend 14

[24] Jury ⚿33(5 15)
230k33(5 15)
If the prosecutor cites demeanor as a reason for striking a juror, courts considering a *Batson* challenge should apply particularly careful scrutiny, because such after-the-fact rationalizations are susceptible to abuse U S C A Const Amend 14

[25] Jury ⚿33(5 15)
230k33(5 15)
Unless the neutral explanation offered by the state for a peremptory strike may, on its face, be tied to the issues, evidence, and context of the case at hand, the explanation will not be considered legitimate, rather, the court reviewing a *Batson* challenge will consider the explanation mere pretext as a matter of law, unrelated as it is to the reality of the proceedings before the district court U S C A Const Amend 14

***294** John D O'Connell Jr and Lori Seppi, Salt Lake City, for Appellant

Mark L Shurtleff, Atty Gen , and Christine Soltis, Asst Atty Gen , Salt Lake City, for Appellee

Before BILLINGS, P J , GREENWOOD and JACKSON, JJ

OPINION

JACKSON, Judge

****1** Anthony James Valdez appeals convictions for aggravated burglary, a first-degree felony, in violation of Utah Code Annotated section 76-6-203 (2002), possession of a dangerous weapon by a restricted person, a second-degree felony, in violation of Utah Code Annotated section 76-10-503(2)(a) (2002), and criminal mischief, a class B misdemeanor, in violation of Utah Code Annotated section 76-6-106 (2002) We reverse and remand

BACKGROUND

****2** Valdez was prosecuted for various domestic violence charges, including the violent crimes listed above On October 29, 2002, the district court conducted voir dire to select a jury for Valdez's trial Following the jury selection, Valdez objected to the State's use of its peremptory challenges under *Batson v Kentucky,* 476 U S 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986) In order to demonstrate a prima facie case of discrimination under *Batson,* Valdez s counsel noted that the State used all four of its peremptory challenges to exclude women from the jury Valdez further noted that in a domestic violence jury trial, gender issues tend to be highly charged Ultimately, he argued, the State's exclusion of only women from the jury cannot be disregarded, on its face, in the context of this case

****3** The State did not argue that Valdez had failed to present a prima facie case of discrimination, but instead argued Valdez's *Batson* challenge was untimely Without addressing the timeliness of Valdez's challenge, the district court ordered the

State to explain its challenges The State explained its challenges as follows

> [T]he State chose to strike Ms Valerio because she stated that she worked for a nonprofit brain injury type of place That is not a basis upon which to strike her [for cause], but I felt her responses lined up in a way that would make her not a helpful [juror] for the State and that she would be somewhat overly compassionate
>
> The second [juror] was Ms Gonzalez She had heard of the case and seemed-- though she said that it wouldn't bother her, her responses to me seemed matter of fact and I felt like her responses would not make her a good juror for the State
>
> Ms Thornton had also heard of the case and I don't recall what it was, there was something that I immediately decided that I would make her one of my strikes She'd also been on a jury and he was found guilty of a manslaughter, which I thought was probably a one-step reduction, at least that's the assumption So again, I felt like she was not going to be a helpful one for the State
>
> The last one I agonized over whether to strike, No 19, Paul[a] Morely or 21 Ron Hardy, I conferred with my colleague, ***295** and we talked about it and she brought to my attention he was a hunter and that she felt like a hunter would know things about guns and brought that point about that potential juror and another one And after conferring with her I changed my mind and went with [her]--and that was simply--she was simply towards the end I suppose there was also it felt like she was not strong, not--I'm sorry, I'm trying to read my notes here
>
> There was this pattern of--her responses made me think she would be somebody, again, that might be willing to let bygones be bygones, what I would say overly compassionate, and it was just based on her responses about position, her responses to little subtle things like her teaching piano lessons and the magazines she chose We don't have a lot to base these things on, so that's how I made those choices

(First alteration in original) Ultimately, the district court accepted the State's explanations and overruled Valdez's objection

****4** During the jury trial, the victim recanted her accusation against Valdez The State called an expert in Battered Women Syndrom (BWS) to explain why many victims of abuse recant their accusation against their abuser Valdez objected to the testimony, but the district court overruled the objection The jury found Valdez guilty of aggravated burglary, possession of a dangerous weapon by a restricted person, and criminal mischief Valdez appeals

ANALYSIS

****5** Valdez challenges the district court's ruling that the State offered nondiscriminatory reasons for its use of peremptory strikes

I Procedural Issues

****6** As a preliminary matter, the State raises two threshold procedural issues that, according to the State, bar appellate review of Valdez's challenges

A Timeliness

[1][2][3][4] ****7** First, the State contends Valdez did not raise his *Batson* challenge in a timely manner Under *Batson,* a challenge to a peremptory strike must be timely *See Batson v Kentucky,* 476 U S 79, 99- 100, 106 S Ct 1712, 1724-25, 90 L Ed 2d 69 (1986) (allowing for local timeliness rules to bar *Batson* challenges), *Salt Lake County v Carlston,* 776 P 2d 653 655 (Utah Ct App 1989) (stating, in context of *Batson* challenge, "[i]t is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was *timely* presented to the trial court in a manner sufficient to obtain a ruling thereon") "Issues not raised in the trial court in timely fashion are deemed waived, precluding this court from considering their merits on appeal " *Carlston,* 776 P 2d at 655 What constitutes a timely challenge under *Batson* depends entirely upon local procedures, *see id , Ford v Georgia,* 498 U S 411, 423, 111 S Ct 850, 857, 112 L Ed 2d 935 (1991), but only " 'firmly established and regularly followed state [procedure]' may be interposed by a State to prevent subsequent [appellate] review" of this important constitutional claim *Id* at 423-24, 111 S Ct at 857 (citation omitted)

****8** Valdez waited to raise his *Batson* challenge until after the venire had been dismissed, the jury had been sworn in, and the court preliminarily instructed the jury The State refers us to several other jurisdictions that require a *Batson* challenge to be raised no later than "in the period between the selection of the jurors and the administration of their oaths " *Id* at 422, 111 S Ct at 857, *see also*

Carlston, 776 P 2d at 655-56 (citing favorably, in dicta, several jurisdictions that require *Batson* challenge to be raised prior to dismissing venire) The reason for barring a *Batson* challenge after the jury is sworn in has been variously stated as follows

> The "timely objection" rule is designed to prevent defendants from "sandbagging" the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten Furthermore, prosecutorial misconduct is easily remedied prior to commencement of trial simply by seating the wrongfully struck venireperson After trial, the only remedy is setting aside the conviction

***296** *Id* at 656 (citations omitted), *see also People v Holder,* 153 Ill App 3d 884, 106 Ill Dec 700, 506 N E 2d 407, 408 (1987) (stating waiver rule enforced "so as not to allow a defendant to object to that which he has acquiesced in" throughout trial)

****9** Furthermore, the State argues, this rule is consistent with Utah Rule of Criminal Procedure 18(c)(2), which provides "[a] challenge to an individual juror may be made only before the jury is sworn except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented " In *State v Harrison*, the Utah Supreme Court applied rule 18's good cause provision to review an untimely *Batson* challenge *See* 805 P 2d 769, 776 (Utah 1991) However, in that case the challenge was "made and argued immediately after the jury was sworn in, before the challenged jurors were excused from service, and before opening statements of counsel " *Id* This is significant, the State maintains, because once the venire and the challenged jurors have been dismissed, the remedy of reinstating the wrongly challenged juror is no longer available Thus, under the State s argument, *Harrison* represents the "outside limit" in Utah to timely raising a *Batson* challenge

[5] ****10** However, under *Harrison*, a district court may consider a defendant's *Batson* challenge beyond the dismissal of the venire, even if it has made no specific finding of good cause pursuant to rule 18 of the Utah Rules of Criminal Procedure *See* 805 P 2d at 776 So long as it "allow[s] counsel to proceed with their [*Batson*] arguments," the district court impliedly finds good cause under rule 18 to consider the constitutional claim *Id* In this case, the district court did just that by ignoring the State's timeliness argument and requiring the parties to proceed directly to arguments on the merits Thus, the district court impliedly found good cause under rule 18 to allow a challenge to the State's peremptory strikes beyond the usual limits

[6] ****11** However, even if we adopted the State's position, we could not "interpose[ ]" it "to prevent subsequent [appellate] review" in this case *Ford,* 498 U S at 424, 111 S Ct at 857 The rule the State proposes, which would prohibit *Batson* challenges after the venire has been dismissed and the jury has been sworn, has not heretofore been a " 'firmly established and regularly followed state [procedure] ' " *Id* at 423, 111 S Ct at 857 (1991) (citations omitted) At best, this rule could be gleaned by analogy and implication from *Harrison* and rule 18 However, rule 18 itself allows *Batson* challenges at a later time than the State's proposed rule, because it allows challenges "before any of the evidence is presented " Utah R Crim P 18(c)(2) Thus, in the absence of any firmer and more established authority on the subject, we could not prevent appellate review of Valdez's constitutional claim due to lack of timeliness [FN1]

> FN1 This issue would best be addressed by an amendment to the Utah Rules of Criminal Procedure This opinion should not be read as a comment, positive or negative, on the appropriateness of the rule the State proposes

B Preservation

[7][8] ****12** Second, the State argues Valdez failed to preserve his objection to the State's explanation for the strikes Specifically, Valdez did not challenge the validity of the prosecutor's explanations for the strikes Consequently, the State argues, Valdez is precluded from attacking the State's explanations for the first time on appeal ' [T]o ensure the trial court's opportunity to consider an issue, appellate review of criminal cases in Utah requires 'that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record ' " *State v Brown,* 856 P 2d 358, 360 (Utah App 1993) (quoting *State v Tillman,* 750 P 2d 546, 551 (Utah 1987))

[9] **13 We are persuaded by Valdez, however, that his initial objection to the State's use of peremptory challenges to strike women from the jury constituted sufficient preservation of his constitutional claim *Ford v Georgia* held that an appellate court cannot prevent review by applying a "rule unannounced at the time of petitioner's trial " ***297** 498 U S 411, 424, 111 S Ct 850, 858, 112 L Ed 2d 935 (1991) In Utah, there is no clear rule requiring a defendant to renew a *Batson* objection or to object specifically to the State's offered explanations Rather, Utah courts do "not require a party to continue to object once a motion has been made, and the trial court has rendered a decision on the issue " *State v Hoffhine,* 2001 UT 4,¶ 14, 20 P 3d 265 Here, Valdez objected to the State's use of peremptory challenges, thereby preventing any claim that he strategically hid his objection until after obtaining an unsatisfactory result, which seems to be the State's strongest objection to Valdez's challenge

II Issue and Standard of Review

[10] **14 Valdez specifically challenges the district court's ruling that the State offered a nondiscriminatory reason for its use of peremptory strikes We are unaware of any cases properly applying an appropriate standard of review for such challenges *State v Chatwin* appears to set forth a "clearly erroneous" standard of review for such challenges *See* 2002 UT App 363,¶ 5, 58 P 3d 867

"Chatwin argues that the prosecution's stated reason for striking the potential juror was not neutral and constituted illegal discrimination Absent a showing of clear error, we will not overturn a trial court's determination concerning the discriminatory intent embodied in a party's explanation for the exercise of a peremptory challenge " *Id* To establish the clearly erroneous standard of review in the step two context, however, *Chatwin* cited, without analysis, *State v Cannon,* 2002 UT App 18, ¶ 5, 41 P 3d 1153 That case set forth the clearly erroneous standard of review in the *step three* context, and is inapplicable here *Chatwin* went further, however, and decided the step two question as a matter of law, rather than applying the clearly erroneous standard it previously set forth Here, our decision will analyze and clarify the appropriate standard of review for step two challenges Accordingly, we must determine the appropriate standard of review, relying on analogy to other standards of review applicable in cases involving alleged discrimination in the voir dire process

[11][12][13] **15 The challenge at issue involves the second step of a tripartite process for determining whether the prosecution has engaged in prohibited discrimination in the jury selection process *See Chatwin,* 2002 UT App 363 at ¶ 7, 58 P 3d 867 The first step of that test requires that a defendant challenging the prosecutor's use of a peremptory challenge must present a prima facie case of discrimination *See id* A trial court's determination that a defendant has presented a prima facie case of discrimination is a matter of some discretion on the part of the trial court, and we will only reverse that determination where the trial court has abused its discretion *See State v Alvarez,* 872 P 2d 450, 456 (Utah 1994) The purpose for allowing the trial court some discretion in determining whether the defendant has presented a prima facie case of discrimination was stated by the Utah Supreme Court as follows

> The abuse of discretion standard of review is particularly appropriate to this question [T]he United States Supreme Court was reluctant to define in detail what facts will raise an inference of discrimination Likewise, we have not articulated specific factors that amount to a "strong likelihood" that minority jurors were challenged because of their racial or ethnic group membership By according discretion to the trial court in this area, we permit "experience to accumulate at the lowest court level" until we "see more clearly what factors are important to [the] decision and how to take them into account "

See id at 456 n 3 (citations omitted) What may constitute a prima facie showing of discrimination in the context of one case may not constitute a showing of discrimination in the context of another case This is so because each case may turn on different issues, or even subtly different nuances Thus, we allow the trial court discretion in making the determination whether, in the context of the specific case, a defendant has presented a prima facie case of discrimination

[14][15] **16 The third step of the tripartite process for determining whether the ***298** prosecution engaged in prohibited discrimination during the jury selection process requires the trial court to weigh the evidence and 'look beyond the explanation, if possible, to determine whether the strike was purposefully discriminatory " *Chatwin,*

2002 UT App 363 at ¶ 7, 58 P 3d 867 More than being dependant on the particular issues, circumstances and nuances of a particular case, this determination requires the trial court to delve into a weighing of the evidence and the credibility of the prosecutor *See Hernandez v New York,* 500 U S 352, 365, 111 S Ct 1859, 1869, 114 L Ed 2d 395 (1991) This is an intensely factual determination, *see State v Cannon,* 2002 UT App 18,¶ 13, 41 P 3d 1153, and we thus review the trial court's factual findings for clear error *See State v Jensen,* 2003 UT App 273,¶ 7, 76 P 3d 188

**17 In our view, the issue involved here, whether the prosecutor offered a legitimate, nondiscriminatory reason for the peremptory strikes, is closely analogous to the step one issue It seems less like a factual issue because the trial court does not weigh evidence, but instead looks to the face of the State's explanations *See Chatwin,* 2002 UT App 363 at ¶ 7, 58 P 3d 867 (stating prosecutor's explanation "must be, at the very least, *facially* neutral" (emphasis added)) The trial court's examination of the facial neutrality of the State's explanation also considers the general context of the case and the specific issues involved, *see id* (stating prosecutor's explanation "must be related to the case being tried"), similar to the way the trial court considers whether the defendant has presented a prima facie case of discrimination *See Alvarez,* 872 P 2d at 455-56 Indeed, the district court's consideration of the context of the case is an indispensable portion of the step two analytic framework, as we will discuss below Thus, steps one and two in the analytical process appear to be analytic reciprocals Accordingly, it is appropriate to consider this issue one of discretion with the trial court and to review the trial court's determination for abuse of that discretion [FN2]

> FN2 Because Valdez's step two challenge constitutes a sufficient basis to reverse, we do not reach his alternate step three argument Further, we do not reach Valdez's arguments regarding the admissibility of Battered Woman Syndrome evidence within the context of this case *See State v Heaton,* 958 P 2d 911, 919 (Utah 1998) (holding where one argument is dispositive of the appeal, we need not address the defendant's remaining arguments)

III *Batson* and its Progeny

**18 Valdez claims the State engaged in impermissible gender discrimination during the selection of the jury In *Batson v Kentucky,* the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution governs the use of peremptory challenges by prosecutors in criminal trials *See* 476 U S 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986) In *Batson,* the United States Supreme Court stated that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,' " *id* at 85, 106 S Ct at 1717 (citation omitted), a "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria " *Id* at 85-86, 106 S Ct at 1717 In *J E B v. Alabama,* 511 U S 127, 114 S Ct 1419, 128 L Ed 2d 89 (1994), the United States Supreme Court extended the holding of *Batson* to protect litigants from gender discrimination in the jury selection process "We have recognized that litigants have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality " *Id* at 128-29, 114 S Ct at 1421

> The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings
>
> When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism ***299** respecting the jury's neutrality and its obligation to adhere to the law " The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side
>
> *Id* at 140, 114 S Ct at 1427 (citations omitted)

[16] **19 Pursuant to *Batson,* Utah courts apply a three-step test to determine whether the prosecutor

has engaged in prohibited discrimination during the jury selection process *See State v Cantu,* 778 P 2d 517, 518 (Utah 1989) (applying three-step test to question of racial discrimination) This test equally applies in cases of gender discrimination *See State v Jensen,* 2003 UT App 273,¶ 13, 76 P 3d 188 (applying three-step test to question of gender discrimination) We have stated the test as follows

> "[O]nce the opponent of a peremptory challenge has made out a prima facie case of [gender] discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a [gender]-neutral explanation (step 2) If a [gender]-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful [gender] discrimination "

Id at ¶ 13 (quoting *State v Colwell,* 2000 UT 8,¶ 17, 994 P 2d 177 (other citation omitted)) (alterations in original)

****20** In the State's brief, it concedes that it waived the issue of whether Valdez presented a prima facie case of discrimination *See Colwell,* 2000 UT 8 at ¶ 18, 994 P 2d 177 (stating prosecution must challenge sufficiency of prima facie case before providing rebuttal explanation for strike, or issue is waived) Thus, we examine only step two of the analysis

[17][18] ****21** Under this step, even "suspect" explanations must be deemed "facially valid" unless they are "inherently discriminatory " *State v. Cannon,* 2002 UT App 18,¶ 10, 41 P 3d 1153, *see also Hernandez v New York,* 500 U S 352, 360, 111 S Ct 1859, 1866, 114 L Ed 2d 395 (1991) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed [gender] neutral ") Although this step "does not demand an explanation that is persuasive, or even plausible," *Purkett v Elem,* 514 U S 765, 767-68, 115 S Ct 1769, 1771, 131 L Ed 2d 834 (1995), it does "require[ ] the proponent of the peremptory challenge, the prosecutor in this case, to come forward with a [gender]-neutral explanation for the challenge " *Colwell,* 2000 UT 8 at ¶ 17, 994 P 2d 177 Utah courts have enumerated a number of factors that must be considered within the context of the case at hand to determine whether the prosecution has offered a legitimate explanation

> The second step [of the analysis] requires "the prosecutor to come forward with a race-neutral explanation for the challenge " This step "does not demand an explanation that is persuasive, or even plausible " So long as the reasons given are " '(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate,' " " 'the reason[s] offered will be deemed race neutral ' "

Cannon, 2002 UT App 18 at ¶ 9, 41 P 3d 1153 (citations omitted)

****22** The courts have been instructive in defining and applying each of these factors For example, in *Hidalgo v Fagen, Inc* , the Tenth Circuit was asked to decide whether a defendant's explanation for a peremptory strike was facially neutral *See* 206 F 3d 1013, 1018 (10th Cir 2000) In that case, the defendant struck a Hispanic woman from the venire, explaining that it was because of her youth *See id* The court, looking specifically at the facial validity of the defendant's explanation, concluded the strike was neutral, holding "A neutral explanation means an explanation based on something besides the race of the juror Unless discriminatory intent is inherent in the justification, the reason offered will be deemed race neutral " *Id* at 1019 Such a rationale is similarly applied to show gender neutrality

***300 **23** The "legitimate" factor is closely related to the "neutral" factor As this court has noted, the Supreme Court has provided guidance in determining whether the reason for a peremptory strike is legitimate " 'a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection ' " *State v Merrill,* 928 P 2d 401, 404 (Utah Ct App 1996) (citation omitted) For example, in *Merrill,* the defendant claimed that the reason the prosecutor gave for his peremptory challenge was not legitimate *See id* The prosecutor had dismissed a potential juror who was Asian *See id* at 402 The reason for the dismissal, the prosecutor explained, was because he feared the potential juror would be biased against law enforcement due to a recent speeding ticket *See id* We concluded that was a legitimate explanation because it "does not deny a potential juror equal protection " *Id* at 404

[19] ****24** The reason for a peremptory strike must also be related to the case being tried In *State v Cantu,* a prosecutor's reason for a peremptory strike of a Hispanic potential juror was invalidated in part

because it was unrelated to the juror or the case *See* 778 P 2d 517, 519 (Utah 1989) The prosecutor's proffered reason for the strike was because he was angry with defense counsel *See id* The Utah Supreme Court held that this explanation was desultory, and thus insufficient to fulfill the *Batson* requirement that peremptory strikes must be based upon grounds reasonably related to the case at bar *See id.*

[20][21] **25 Finally, the reason for a peremptory strike must be clear and reasonably specific This factor prevents a prosecutor from merely denying the existence of a discriminatory motive or by generally proclaiming good faith, ensuring that equal protection will not become a "vain and illusory requirement " *Batson v Kentucky,* 476 U S 79, 98, 106 S Ct 1712, 1724, 90 L Ed 2d 69 (1986) Rather, it requires the prosecutor "to articulate a neutral explanation related to the particular case, giving a clear, concise and reasonably specific legitimate explanation for excusing those jurors " *New Mexico v Aragon,* 109 N M 197, 784 P 2d 16, 21 (1989) There must also be support in the record for such an explanation *See State v Macial,* 854 P 2d 543, 547 (Utah Ct App 1993) For example, in *Aragon,* the prosecutor struck two prospective jurors who were black because they were possibly related to the defendant *See* 784 P 2d at 17 The New Mexico Supreme Court noted that nothing in the record showed the prosecutor had any basis for his opinion that the potential jurors might be untrustworthy, other than his own statement of their possible blood relationship *See id* As a result, the court ruled that "[t]he prosecutor's explanation was hardly 'a clear, concise, and reasonably specific explanation for excusing those jurors ' " *Id* at 21 (citation omitted) Accordingly, the court reversed the trial court *See id*

IV Valdez's *Batson* Challenge

[22][23] **26 With that analytical framework in mind, we approach Valdez's step two challenge Valdez's argument that the State's peremptory challenges violated equal protection is persuasive Specifically, Valdez argues that the State's reason for using peremptory challenges to strike only women was not reasonably clear or specific As in *Aragon,* there is little in the record to demonstrate that the State had any basis for its strikes of these four women For example, as Valdez aptly notes, the State explains that Jurors Morely and Valerio were "overly compassionate" and Gonzalez was "matter of fact" without providing any clear basis for its opinions other than these cursory descriptions Further, the prosecutor stated variously I felt her responses lined up in a way that would make her not a helpful witness for the State [H]er responses to me seemed matter of fact and I felt like her responses would not make her a good juror for the State I don't recall what it was [about Ms Thornton], there was something that I immediately decided that I would make her one of my strikes " These explanations all fall short of being reasonably clear and specific It is not enough for the prosecutor simply to describe a nondiscriminatory motive without tying it to something specific about the juror herself *See United States v *301 Horsley,* 864 F 2d 1543, 1546 (11th Cir 1989) (holding prosecutor's explanation that he struck juror because "I just got a feeling about him" "obviously [fell] short" of being reasonably clear and specific)

[24] **27 If the prosecutor cites demeanor as a reason for striking a juror, courts should apply "particularly careful scrutiny" because "such after-the-fact rationalizations are susceptible to abuse " *Brown v Kelly,* 973 F 2d 116, 121 (2nd Cir 1992) Although not required, prosecutors "would be well advised to make contemporaneous notes as to the specific behavior on the prospective juror's part that renders such person unsuitable for service on a particular case " *Id* In this case, however, the State was hardly clear, concise, or reasonably specific in its explanations It offered nothing more than vague and generic descriptions of the jurors that anyone would concede are nondiscriminatory, but which do not appear to have anything to do with the jurors themselves This is not sufficient to satisfy our equal protection jurisprudence, and is sufficient in itself to reverse the trial court's treatment of the State's peremptory strike

**28 In addition to not being reasonably clear and specific, some of the State's explanations were unrelated to the case at hand For example, the State struck Thornton because she had been on a jury that had found a defendant, who had been charged with murder, guilty of manslaughter As Valdez correctly notes, other than being a criminal offense, manslaughter has nothing to do with the present case Valdez was not charged with

manslaughter or any other lesser-included offenses Furthermore, Thornton's participation on a jury that convicted another defendant of manslaughter does not undermine her ability to be impartial in the present case

[25] **29 The State argues in its brief that these explanations were not inherently discriminatory because nothing in the explanations themselves pointed directly to the sorts of invidious stereotypes the law condemns While this may be true, the test for determining the legitimacy and facial neutrality of an explanation in the *Batson* context is the list of factors outlined in *Cannon, see* 2002 UT App 18,¶ 9, 41 P 3d 1153, and analyzed above Unless the neutral explanation offered by the State may, on its face, be tied to the issues, evidence, and context of the case at hand, the explanation will not be considered legitimate Rather, we will consider the explanation mere pretext as a matter of law, unrelated as it is to the reality of the proceedings before the district court

**30 Were we to hold otherwise, we would sanction the use of fanciful and spurious explanations for even the most sinister discriminatory motives Without the requirement that the explanation at least have, on its face, a grounding in the context of the case itself, racist or sexist motives could more easily be masked by unrelated but inherently nondiscriminatory explanations In such a case, the district court would have no need to proceed to step three to plumb the depths of the prosecutor's motivations because the State had offered nothing *concrete* by way of explanation *See State v Chatwin,* 2002 UT App 363,¶ 20, 58 P 3d 867 (holding State did not offer legitimate step two explanation, obviating the need to proceed to step three) This is just such a case The prosecutor's explanations had no clear and specific basis in the case at hand Thus, we hold it was an abuse of the district court's discretion to determine the explanations were nondiscriminatory and to proceed to step three

CONCLUSION

**31 The State's peremptory strikes should have been invalidated by the trial court because the State failed to offer facially legitimate, nondiscriminatory explanations The explanations were neither clear and specific nor related to the case being tried Accordingly, we reverse and remand for a new trial

**32 WE CONCUR JUDITH M BILLINGS, Presiding Judge and PAMELA T GREENWOOD, Judge

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Addendum B

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,

Petitioner,

v. Case No. 20040633-SC

Anthony James Valdez,

Respondent.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on August 2, 2004.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues:

1. Whether a Batson challenge may be deemed timely if the jury has been sworn and the remainder of the venire excused.

2. Whether the court of appeals applied the correct criteria for a Batson analysis and the correct standard of review on appeal.

FOR THE COURT:

November 5, 2004
Date

Christine M. Durham
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on November 5, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below:

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and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court(s) listed below:

THIRD DISTRICT, SALT LAKE
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By _____
Deputy Clerk

Case No. 20040633-SC
THIRD DISTRICT, SALT LAKE, 021907256
Appellate No. 20030089-CA

Addendum C

RULE 18. SELECTION OF THE JURY

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(1) *Strike and Replace Method.* The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(2) *Struck Method.* The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(**d**) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(1) Want of any of the qualifications prescribed by law.

(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

(6) Having served on the grand jury which found the indictment.

(7) Having served on a trial jury which has tried another person for the particular offense charged

(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(10) If the offense charged is punishable with death, the entertaining of opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction or would require the juror to impose the death penalty following conviction regardless of the facts.

(11) Because the juror is or within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, and privileges as principal jurors. Except in bifurcated proceedings, an alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until the jurors begin deliberations.

(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

§ 78–46–16. Jury not selected in conformity with chapter—Procedure to challenge—Relief available—Exclusive remedy

(1) Within seven days after the moving party discovered, or by the exercise of diligence could have discovered the grounds therefore, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings or to quash an indictment, or for other appropriate relief, on the ground of substantial failure to comply with this act [1] in selecting a grand or trial jury.

(2) Upon motion filed under this section containing a sworn statement of acts which if true would constitute a substantial failure to comply with this act, the moving party may present testimony of the county clerk, the clerk of the court, any relevant records and papers not public or otherwise available used by the jury commission or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand or a trial jury there has been a substantial failure to comply with this act and it appears that actual and substantial injustice and prejudice has resulted or will result to a party in consequence of the failure, the court shall stay the proceedings pending the selection of the jury in conformity with this act, quash an indictment, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this act.

Laws 1979, c. 130, § 1; Laws 1989, c. 153, § 25;

[1] Laws 1979, c 130 that enacted this chapter.

Addendum D

THE COURT: All right. Thank you.

MS. THORNTON: My name is Tamara Thornton. I work at Thornton Plumbing and Heating, I've worked there about 20 years and I do payroll and benefits. Two years of college. My husband's name is Clay and he is an owner at Thornton Plumbing and Heating. We have three children, 20, 17 and 13. Deseret News comes to our home and Popular Science and such like that.

Hobbies, I enjoy reading and take Irish folk dancing classes, things like that.

THE COURT: Are you in a group?

MS. THORNTON: Yes.

THE COURT: Is it like river dance?

MS. THORNTON: It's like river dance but I'm just a beginner, so I'm not going to do any demonstrations.

THE COURT: That was my next question. And your family company, how big is it?

MS. THORNTON: We have 58 employees. It's a third-generation company.

THE COURT: So does it do subcontracting, is it in a building?

MS. THORNTON: Yes, we are usually a subcontractor doing plumbing, radiant heating, HVAC, snow melting. That's kind of our specialty, the radiant --

THE COURT: Okay. Thanks.

MS. VALERIO: My name is Lynda Valerio. I'm an

office manager for a nonprofit agency called the Burn Injury Association of Utah. I also train individuals with sustained brain injuries to return to employment.

I have a high school education with some trade schooling classes that I've taken. My husband's name is Chris. He is a customer service representative with a cell phone company here in Salt Lake. We have two children, one will be five in two weeks and a daughter that is 16 months old. My husband gets Sports Illustrated and that's the only magazine or newspaper we get. Hobbies, I enjoy camping and any outdoor activities, any crafts, ceramics and things like that.

THE COURT: Tell me a little bit about this nonprofit that you work for. Is it totally private donations or are you able to get any federal funding for that?

MS. VALERIO: We apply for grants so that we can provide services for these individuals but we are the only agency brain injury association in the state of Utah, so we serve the whole state for resources and --

THE COURT: Do you also work on issues such as housing and that?

MS. VALERIO: We do. If an individual is in need of housing, medical assistance, anything like that, we do refer them out to professionals that can help them with that.

THE COURT: Do you also set up sort of a continuous support? It seems that the issue of housing and being able to

function on a day-to-day basis is a very real issue.

MS. VALERIO: Yeah, we help them to get connected with independent living skills, we also help with doing that training.

THE COURT: Thanks.

MS. CURTIS: My name is Peggy Curtis. I was a substitute teacher for over 32 years. I worked mainly in the Granite School District. I have both elementary and secondary certificates, which of course I have the bachelor's degree but some post education. I have temporarily retired from that. My husband is Alan, and he has retired from Questar Gas, which is Mountain Fuel. We retired just about a couple years ago, so it may not be a permanent retirement, we may be going back to work.

We have two children, I have a son that's 32 and then I had another son who we lost to a sudden onset of cancer three years ago, and he was 26 at the time. I also have a grandbaby, she'll be a year old next month, our pride and joy.

We subscribe to the Tribune and read it quite regularly. My husband also takes Outdoor Life. We own a home in Beaver Dam, Arizona, which is between St. George and Mesquite on I-15 and we spend some of our winter times down there. So we enjoy gardening down there and up here in the summer Down there it's too hot. And we have a motor home and --

THE COURT: Where is this town? I didn't think there was anything on that little strip.

MS. CURTIS: It's in the Arizona strip. It's 8 miles north of Mesquite, 26 miles south of St. George and it is in what they call the Arizona strip. Littlefield is what you'll sometimes see on the off ramp of I-15. It's a retirement community and it's maybe, I don't know, a thousand people. A lot of them will leave in the summer, you know, when it's too hot and go back up, kind of like snowbirds.

THE COURT: Is it east or west of I-15?

MS. CURTIS: Some people will say north or south, depending how the road goes. As you're going south it's on the right. And actually there's two towns, Littlefield is on the left of the freeway as you're going south and Beaver Dam is on the right. They've combined them, they're not incorporated towns. So, you know, there is an elementary school, it's growing quite rapidly down there with some regular full families moving in a lot now too, but we just have a summer home.

THE COURT: Do they commute?

MS. CURTIS: A lot of them in Mesquite and some in St. George.

THE COURT: Okay. Thank you.

MS. ROBERTS: My name is Christine Roberts. I work at Bausch & Lomb assembling medical devices. High school

education. I'm divorced. I have three children, three boys, 16, 14 and 11. They keep me quite busy. Right now we don't subscribe to any magazines or newspapers other than the TV guide. And hobbies, my boys' sports and we're actively involved in our Catholic church, we do a lot of things to help out people and stuff. And that's about it.

THE COURT: I thought Bausch & Lomb is -- doesn't that make lenses?

MS. ROBERTS: Yes.

THE COURT: Is that what you do?

MS. ROBERTS: No, we actually produce an orb scan it's called, and it scans your eyes, the posterior and exterior of your eyes and it's a -- right on the temple.

THE COURT: Is that to check for --

MS. ROBERTS: It measures the posterior and exterior of your eye to find anything wrong with your eyes.

THE COURT: Like astigmatism or something like that?

MS. ROBERTS: Uh-huh. Uh-huh.

THE COURT: So the actual manufacturing facility is right here in Salt Lake?

MS. ROBERTS: Yes, it's here. There's about 35 or 40 employees there.

THE COURT: Okay. All right. Thanks.

MS. GONZALEZ: My name is Joyce Gonzalez and I'm trying to retire as housekeeping. And I have a high school

level education. And my spouse's name is Jessie and he retired from Hercules. And I have three children, 45, 43 and 41, a daughter and two sons. And we take the Tribune and just craft magazines. And my hobbies, we have a cabin at Scofield Reservoir that takes up a lot of our time in the summer, and my grandchildren.

THE COURT: How many grandchildren do you have?

MS. GONZALEZ: Four.

THE COURT: Now, what are you trying to retire from?

MS. GONZALEZ: Well, I clean houses for my children and they don't want me to quit. I'm ready to quit. So I'm trying to quit.

THE COURT: Good luck. Thanks.

MS. UNGVICHIAN: My name is Jennifer Ungvichian. I'm a full-time student up at the university and an office manager for Spiral Productions and Higher Ground Learning. I am a sophomore up at the University. I'm not married and don't have any kids. We don't take any magazines or newspapers at our house. And when I'm not working or going to school I'm studying or I do yoga and volunteer at the Road Home. That's it.

THE COURT: What are you studying at the U?

MS. UNGVICHIAN: I'm a mass communications major.

THE COURT: Do you want to -- are you planning on using that degree?

THE COURT: What service?

MR. MOISION: I retired out of the International Guard.

THE COURT: Okay. Do you have any patents or do you think you'll get any?

MR. MENKE: I've got one I'm working on.

THE COURT: All right. Thanks.

MS. MORLEY: My name is Paula Morely. I work part time for Jordan School District and I give piano lessons in my home. I have a college degree, a bachelor's. My spouse's name is Russell, he is a store manager for the Deseret Book Company. We have five children, one of whom is deceased. The others are 23, 20, 16 and 14 years old.

We take the Readers Digest and the Deseret News at our home and Sports Illustrated for the boys. My hobbies include music, baking, outdoors things with my family, camping and going to football games and things.

THE COURT: Utah, BYU?

MS. MORLEY: BYU.

THE COURT: That's okay to say that in Salt Lake.

MS. MORLEY: One's as bad as the other.

THE COURT: What do you do at the Jordan School District?

MS. MORLEY: Title one aide in an elementary school. I work in the computer lab.

THE COURT: What does title one mean? Is it a designation?

MS. MORLEY: It's a federal program to help boost the reading and math levels.

THE COURT: Is it sort of a resource --

MS. MORLEY: Yes.

THE COURT: -- position?

MS. MORLEY: Yes.

THE COURT: All right. Thank you.

MR. PAULSEN: My name is Jeff Paulsen. I'm a full-time student, a photographer for the daily Utah Chronicle. I'm working on my undergraduate degree in urban planning. My wife's name is Jennifer. She is the campaign coordinator for the Leukemia Lymphoma Society. Two spoiled dogs, so many magazines I wouldn't even want to go there.

THE COURT: They're not illegal publications; right?

MR. PACE: Oh, no. We just get a lot of door to door in the Avenues, and probably every neighborhood, but they just pile up. Hobbies, leisure activities, anything that involves adrenaline and gear I'm pretty much a sucker for.

THE COURT: Okay. Where is the urban planning degree? What department is that in, is it in --

MR. PAULSEN: It's in the geography department.

THE COURT: Is there an overlapping with architecture?

And, Mr. O'Connell, I'm going to ask you to do the same thing, introduce yourself and your client, any witnesses you may call.

MR. O'CONNELL: My name is John O'Connell, Jr., I got my JD degree and I represent Anthony James Valdez. Do you want to stand up? And other than the State's witnesses -- we may call other witnesses if they don't, but that's all the witnesses we have.

THE COURT: Do either of you know Mr. O'Connell or Mr. Valdez? If so, please raise your hand. All right. No hands have been raised.

Have any of you heard or read anything about this case? If so, please raise your hand. All right.

Yeah, Ms. Thornton.

MS. THORNTON: I believe I heard about it on the news months ago.

THE COURT: Do you have any specific recollection of this case?

MS. THORNTON: Not specific, no.

THE COURT: And just answering yes or no, is there anything about your knowledge that you believe would affect your ability to be an impartial juror in this case?

MS. THORNTON: No.

THE COURT: Yes, Ms. Curtis.

MS. CURTIS: I believe I also remember just reading

generally about it, but nothing specific.

THE COURT: Any impressions that you feel would affect your ability to serve as a juror in this case?

MS. CURTIS: I hope not, I don't think so.

THE COURT: No further hands have been raised. Oops.

MS. GONZALEZ: I recall seeing it on the news and --

THE COURT: Okay. Do you believe that having heard something about this would interfere with your ability to serve as a juror in this case?

MS. GONZALEZ: I don't think so.

THE COURT: I see. Yes.

MS. WEIGHT: I just remember reading generally about it as well.

THE COURT: Okay. Anything about what you heard that you believe would interfere with your ability to serve as a juror in this case?

MS. WEIGHT: I -- well, I probably should admit to the court after being married to a cop for almost 20 years I have some issues, yes.

THE COURT: You know, we may talk to you in chambers after a while about that. There will be further questions with regard to law enforcement issues too.

All right. Anyone else? All right. Let me explain to you a little bit about the function of the various parties in -- participants in the case.

THE COURT: Okay. So it was a civil -- you indicated it's a civil case. Did you serve as like an expert witness or anything like that --

MR. JACOBSON: Yes.

THE COURT: As part of your professional expertise?

MR. JACOBSON: Correct.

THE COURT: And you actual did testify at trial?

MR. JACOBSON: Yes.

THE COURT: Anything about that experience you believe would affect your ability to be an impartial juror in this case?

MR. JACOBSON: No.

THE COURT: Mr. Paulsen?

MR. PAULSEN: I was a witness as well as a plaintiff in the civil and criminal trials.

THE COURT: The criminal trial was the one that you were involved in and the civil --

MR. PAULSEN: Same.

THE COURT: Same circumstance, okay, all right. Okay.

Anyone else?

Have any of you ever served on a jury before? If so, please raise your hands.

Ms. Thornton, do you recall if it was --

MS. THORNTON: Criminal.

THE COURT: How long ago was that?

MS. THORNTON: Eight years ago.

THE COURT: Do you recall whether the jury was able to reach a verdict?

MS. THORNTON: Yes.

THE COURT: Do you recall what that was?

MS. THORNTON: Yeah, he was found guilty of manslaughter.

THE COURT: Okay. Anything about that experience you believe would affect your ability to serve on this jury?

MS. THORNTON: No.

THE COURT: Okay. Others?

Okay. Ms. Zingleman, civil or criminal?

MS. ZINGLEMAN: Two criminal.

THE COURT: How long ago?

MS. ZINGLEMAN: One was about four years ago and one was about 17.

THE COURT: You're just lucky. Some people haven't even been called before probably.

Were the juries able to reach verdicts in those cases?

MS. ZINGLEMAN: Yes.

THE COURT: Do you recall what they were?

MS. ZINGLEMAN: They were both guilty. One was a disorderly drunken driving and the other was convicted of rape.

follow the instructions then it creates a problem, but Mr. Pace said that he couldn't give police the same weight as any other witness simply because of the police status, and he also responded that his friend had been charged and he didn't like the way that turned out and, therefore, that would influence his decision.

MR. O'CONNELL: Also don't know what he means by that, he may give cops more weight. He actually works in I would say a law enforcement capacity, that's what I first thought when he said that, and if that's the case that's something I don't know that the State really can object to.

THE COURT: I find an entirely different situation from victims and find that he indicated that he could not follow my instruction as to the law and that's an appropriate for-cause challenge. Okay.

We're going to need to see these five, and I did them out of order. The first one is Ms. Stavros and I have four for-causes, Pace, Weight, Paulsen and Bass at this point.

MR. O'CONNELL: Yes.

THE COURT: Hi, come on in. The attorneys are -- or at least one -- well, maybe both attorneys have just a couple follow-up questions.

Mr. O'Connell?

MR. O'CONNELL: Yeah, you mentioned that I guess you were a victim of abuse in a marriage?

MS. STAVROS: Uh-huh.

MR. O'CONNELL: Can you tell me more about -- was that something that happened early in the marriage? You said you were married for quite a long period of time. Or was that what ended the marriage?

MS. STAVROS: Actually, it didn't happen until the end, you know, close to the end of the marriage, and it was just a -- it was actually more emotional abuse than really physical abuse. And it was just a combination of situations and everything and, you know, I -- it wasn't something that, you know, I harbor any feelings about.

THE COURT: And you've been divorced for ten years now, did you say?

MS. STAVROS: Twenty-three.

THE COURT: Yeah, you've actually been divorced for 23 years.

MS. STAVROS: Uh-huh.

MR. O'CONNELL: Also I wanted to ask you, you said that you -- also that your son was assaulted and you went to trial on it.

MS. STAVROS: Yeah.

MR. O'CONNELL: You said you tried to blank it out. Why is that?

MS. STAVROS: Just because it's been a very hard situation to deal with as far as he was going to be a

veterinarian and he can't do that because he has a shake now and there's -- it's created, you know, some situations in his life that wouldn't have been there if the assault didn't occur. And it's just, you know, I've just tried to not look at that part of it and just tried to look at all the positive things, you know, not dwell on what happened.

MR. O'CONNELL: Okay. And you said you went to trial on that?

MS. STAVROS: Uh-huh.

MR. O'CONNELL: And it was a criminal case?

MS. STAVROS: Yeah. I did not have to testify. And the reason we never took it to a jury trial is because the doctors felt like it would be too traumatic for my son to have to relive it because it had been a whole year and he was making major progress in his battle to overcome some of the problems that he had.

MR. O'CONNELL: So how did it resolve?

MS. STAVROS: The one person that did the actual beating with a baseball bat did go to jail.

MR. O'CONNELL: So he pled to something, I take it?

MS. STAVROS: What?

MR. O'CONNELL: There was some sort of plea bargain that they did that you didn't take it to trial?

MS. STAVROS: We just didn't want to go to trial because it was something that the psychologists did not think

my son could live through again.

MR. O'CONNELL: How did you feel about all that, how it resolved?

MS. STAVROS: You know, no one can ever go back and -- I mean no matter what happened, you can't erase what did --

MR. O'CONNELL: What about how it resolved with the plea bargain and -- was that okay with you or do you feel that it would have been better if something could have been more -- could have been done?

MS. STAVROS: That's a hard question to answer. I feel like justice was done, you know, I feel like justice was done.

MR. O'CONNELL: And knowing that this is a criminal case and also involves an assault, do you think that that experience will affect your ability to be --

MS. STAVROS: I hope it wouldn't because, you know, every aspect is different, every situation is different.

MR. O'CONNELL: You hope but you're not sure?

MS. STAVROS: I'm not positive really, you know. I'm not positive. But I feel like I'm really a pretty objectionable person that I would look at everything.

MR. O'CONNELL: Okay.

THE COURT: Mr. Burmester, any questions?

MR. BURMESTER: No.

THE COURT: All right. Thanks, Ms. Stavros.

MS. STAVROS: Thank you.

THE COURT: Hi.

THE WITNESS: Hi.

THE COURT: Just a follow-up question or two. I'm going to let the -- this is Ms. Tamara Thornton.

Mr. O'Connell?

MR. O'CONNELL: You said that you were a victim of domestic violence?

MS. THORNTON: No, I never said that.

THE COURT: No, she said she'd heard something about the case.

MR. O'CONNELL: I'm sorry.

MS. THORNTON: Then I was a juror.

MR. O'CONNELL: Let me ask -- you said you heard about this on the news. What do you remember hearing?

MS. THORNTON: I don't have a real strong memory of it, I just vaguely remember the name seemed familiar and that there was an individual broke into a home, and I just really don't remember a lot about it.

MR. O'CONNELL: Okay. Are you sure that this case was the one you're thinking about in the news or are you just --

MS. THORNTON: I guess I'm not 100 percent sure.

MR. O'CONNELL: And other than that, you heard an

individual had broken into a home, do you remember anything else about it?

MS. THORNTON: Yeah, no.

THE COURT: Mr. Burmester, questions?

MR. BURMESTER: No.

THE COURT: You indicated earlier that you would be able to set aside any of that. Do you feel at this point you would have any problem with weighing only the matters you hear in court?

MS. THORNTON: No.

THE COURT: The evidence?

MS. THORNTON: No.

MR. O'CONNELL: One other question: Was it in the newspaper or on TV?

MS. THORNTON: It was on TV.

THE COURT: All right. Thanks, Ms. Thornton.

MR. O'CONNELL: It's Curtis, right?

THE COURT: Is this Ms. Curtis?

THE BAILIFF: Yes.

THE COURT: Hi.

MS. CURTIS: Hello.

THE COURT: Just a couple of follow-up questions. I'm going to let the attorneys ask any --

MS. CURTIS: Then I did have something to say. I was thinking about it after you left and as a child I was a victim

of sex abuse. It was back in those days it was something that was not done. It was nothing severe, it never went -- it was in the family, it was my father, but it has never been -- I mean nobody knows it except my psychiatrist and -- you know, but it's something that has been in the past and has never -- you know, it was never brought up.

Then there was also when I was about 15 babysitting there was -- like I said, the sex abuse was not -- there was no rape, it was more molestation, and babysitting I also was subjected to some unwanted touching and things when I was a teenager. And I went home at that time and told my father about it and he, a military man, was very -- I'll take care of this and had me scared to death, but he has never acknowledged anything that he had ever done. Prior to this day we still haven't, but I didn't -- in fact, it just hit me.

THE COURT: That's fine to do this in a little bit more comfortable, less public forum.

With regard to those issues, they happened when you were -- both of the times when you were still a child?

MS. CURTIS: Very young, yes, correct.

THE COURT: Do you believe that that would interfere with your ability to weigh the facts in this case?

MS. CURTIS: No, absolutely not. I consider myself very professional that I would not do that. But I did want to let you know.

THE COURT: I appreciate that.

Mr. O'Connell? I think Ms. Curtis indicated she may have heard something about this case.

MR. O'CONNELL: You said you may have heard this case in the news?

MS. CURTIS: Right. Like I said, I read the newspaper quite thoroughly but, again, I don't remember details. I do remember -- in my mind when you were reading over the charges it seemed in my mind I remembered something about with the child abuse. It seems like there wasn't an abuse on the child but the child was present or something when there was some alleged abuse of a mother or a female or something. I mean in my mind this is -- now, whether it was this case or another, but this is what I kind of remember. Again, I don't remember anything, you know, other than that kind of -- because I guess I remember thinking, yeah, it's a first time I guess -- I remember thinking that child abuse can be something that the child endures visually or something as opposed to the physical. I remember thinking that. Now, again, I'm not sure it was this case, but I remember something of that kind. I'm thinking it might have been.

THE COURT: Is there anything about perhaps hearing something in the news you believe would affect your ability to serve? Specifically, as I've instructed you, the only evidence you can weigh if you are on the jury is evidence that comes in

during the court proceeding. Do you believe you could follow that instruction?

MS. CURTIS: I believe I can, yes.

THE COURT: Any follow-up questions?

MR. O'CONNELL: That was newspaper? You think that's where you heard it?

MS. CURTIS: I believe it was. I believe it was the Tribune, is the one I read.

THE COURT: Mr. Burmester?

MR. BURMESTER: No questions, Your Honor.

THE COURT: Okay. Thanks, Ms. Curtis.

MS. CURTIS: Uh-huh.

THE COURT: And you're Christine --

THE WITNESS: Yes.

THE COURT: Ms. Roberts, just a couple follow-up questions. I'm going to let the attorneys ask questions in here.

Mr. O'Connell?

MR. O'CONNELL: You said you were a victim of domestic violence; right?

MS. ROBERTS: Yes.

MR. O'CONNELL: Can you explain a little bit more?

MS. ROBERTS: My son's dad beat me.

MR. O'CONNELL: And how long ago was that?

MS. ROBERTS: He's 11 and he was -- he was about four

years old, so about seven years ago.

MR. O'CONNELL: Okay. And was this only like once or was this over a period of time?

MS. ROBERTS: No, it was over a period of time. Over maybe six months or a year.

MR. O'CONNELL: Okay. Now, you said that there wasn't any criminal case ever?

MS. ROBERTS: No, I mean I came to court to get custody of my son and I got a restraining order on him and then that's -- then I didn't go back to court or anything, I didn't press charges.

MR. O'CONNELL: Okay. Why didn't you press charges?

MS. ROBERTS: Why didn't I?

MR. O'CONNELL: Yeah.

MS. ROBERTS: I was afraid. I was -- that's -- I was afraid. I just wanted him out of my house and out of my life and I didn't want --

MR. O'CONNELL: Were the police ever called or did you -- they ever call the police?

MS. ROBERTS: Yeah, I went and got the police and they took him out of my home.

MR. O'CONNELL: Is that the same time that you got the protective order?

MS. ROBERTS: Yes.

MR. O'CONNELL: Now, you also mentioned -- well, I

guess let me follow up on -- with that. This case also involves sort of a domestic situation. And do you think that the fact that you've been a victim of domestic violence may affect your ability to be fair in the case, do you think --

MS. ROBERTS: I don't feel that it would, just because I'm -- I don't -- I'm a fair person, you know, I don't like particularly -- I don't like particularly judge people or -- and I'm friends with my ex now, I mean I don't hold a grudge or -- it was just circumstance. But I don't feel that it would.

MR. O'CONNELL: What about the victim, do you think you would have any sort of feelings towards this person?

MS. ROBERTS: Being in their shoes type thing?

MR. O'CONNELL: Being in their shoes, yeah.

MS. ROBERTS: I don't know.

MR. O'CONNELL: One last one. You also said that there was a witness with a burglary and I know you didn't actually witness it yourself, it was just in your home?

MS. ROBERTS: Right.

MR. O'CONNELL: But somebody broke in and did something to somebody in your house, what was it they were accused of doing --

MS. ROBERTS: Accused of -- it was ridiculous. The little girl, she's 16, she accused my neighbor of coming into my house and attempting -- she wanted to press charges for

attempted rape, but when it all came down, she invited him into my home and he was my neighbor, I knew him. And we went to court and they just called me because I was the owner of the house and wanted to know if I wanted to press charges for breaking and entering, which she allowed him into my home. So nothing -- I went to court but I didn't get called to the stand or anything, I just listened to what they said.

MR. O'CONNELL: Okay. That's all I have.

THE COURT: Mr. Burmester, any questions?

MR. BURMESTER: No questions.

THE COURT: Okay. Thanks, Ms. Roberts. You're free to leave. Thank you.

Hi, Ms. Gonzalez.

MS. GONZALEZ: Hello.

THE COURT: Just a brief few questions maybe. It appears that -- I just noted that you saw -- you thought you'd heard something about this case on the news.

MS. GONZALEZ: Uh-huh.

MR. O'CONNELL: What do you remember exactly?

MS. GONZALEZ: I remember hearing about the break-in in the area, just the address. With --

MR. O'CONNELL: What was the -- what area are we talking about?

MS. GONZALEZ: Was it Ensign Avenue?

THE COURT: Emery Street.

THE WITNESS:

MS. GONZALEZ: Emery Street? It's just very vague because I just remember the name and the incident.

MR. O'CONNELL: That's all you remember is that there was a break-in?

MS. GONZALEZ: Exactly, yeah.

MR. O'CONNELL: Are you sure that it's this incident we're talking about?

MS. GONZALEZ: I think it is. Like I say, I read the newspaper every day, and it just sounded familiar to me.

MR. O'CONNELL: Okay. That's all I have.

THE COURT: Okay. I already asked this in court, but I'll just ask it again. You are required to weigh only the evidence that comes in to court through witnesses or otherwise, documentary evidence or exhibits. Do you believe that you could do that, that you could not think of anything you may have heard before about this and just weigh what is presented to you in court?

MS. GONZALEZ: I think I could, uh-huh.

THE COURT: All right. Good.

Mr. Burmester, questions?

MR. BURMESTER: No questions.

THE COURT: All right, Ms. Gonzalez. Thank you.

MS. GONZALEZ: Thank you.

THE COURT: Okay. I think Ms. Thornton, Ms. Curtis

and Ms. Gonzalez are fine, the ones that may have heard about the case. Mr. O'Connell, what about Ms. Stavros?

MR. O'CONNELL: I'm still objecting to Ms. Stavros. I even know this, she says she thinks she can be fair but I think it's a different matter when you actually start hearing the case and hearing the evidence and the fact that she was a victim of abuse before and compounded by the fact that her son was also assaulted which was also -- as well as just the fact that what she originally said she said she tried to blank it out, could not remember until it popped up. That's what I worry about with victims. She said she hoped she would not, it would not affect her, but she was not sure. So I would -- I would ask that she be struck for cause.

MR. BURMESTER: Ms. Stavros, I think with her responses to the son victim seemed unable to separate that, so I'm okay with --

THE COURT: Okay. I agree. I'll strike her for cause.

What about Ms. Roberts?

MR. O'CONNELL: Again, what I'm concerned about in this case is we're going to have a victim who is going to come up and who is going to basically recant.

THE COURT: Well, we don't know what she's going to do.

MR. O'CONNELL: I'm pretty sure she's going to do

Addendum E

copies of the convictions, the sentences in those cases, the judgments. Okay. Did I represent that accurately?

MR. O'CONNELL: Yes, Your Honor.

THE COURT: All right. Anything else before we break?

MR. O'CONNELL: Yes, Your Honor. Your Honor, I noticed that when we were doing the jury selection that the State struck all women, and that's a basis for a Batson challenge.

THE COURT: Not a Batson.

MR. O'CONNELL: Whatever the follow-up case is that extended Batson, the gender, and I think at this point all I need to do is establish that there was a pattern. And I think the fact that the State used all of their peremptories on women -- I don't know if there's any better evidence to show that there is a pattern of -- based on gender. I don't think we had any minorities at all, even Ms. Gonzalez didn't appear to be Hispanic, so I don't think I'd have any based on race, but on the fact that the State moved every single one of the peremptories were based on --

THE COURT: Mr. Burmester?

MR. BURMESTER: Your Honor, I think defense counsel's objection is untimely. We've seated this jury, sworn this jury, the proper Batson challenge must be made prior to that point.

THE COURT: Well, not withstanding that, can you give me a basis to rebut Batson type challenge?

MR. BURMESTER: Yes, Your Honor. With regard to the State's number one, the State chose to strike Ms. Valerio because she stated that she worked for a nonprofit brain injury type of place. That is not a basis upon which to strike her, but I felt her responses lined up in a way that would make her not a helpful witness for the State and that she would be somewhat overly compassionate.

The second witness was Ms. Gonzalez. She had heard of the case and seemed -- though she said that it wouldn't bother her, her responses to me seemed matter of fact and I felt like her responses would not make her a good juror for the State.

Ms. Thornton had also heard of the case and I don't recall what it was, there was something that I immediately decided that I would make her one of my strikes. She'd also been on a jury and he was found guilty of a manslaughter, which I thought was probably a one-step reduction, at least that's the assumption. So again, I felt like she was not going to be a helpful one for the State.

The last one I agonized over whether to strike, No. 19, Paul Morely or 21 Ron Hardy, I conferred with my colleague, Ms. -- and we talked about it and she brought to my attention he was a hunter and that she felt like a hunter would

know things about guns and brought that point about that potential juror and another one. And after conferring with her I changed my mind and went with Ms -- and that was simply -- she was towards the end. I suppose there was also it felt like she was not strong, not -- I'm sorry, I'm trying to read my notes here.

THE COURT: I see.

MR. BURMESTER: There was this pattern of -- her responses made me think she would be somebody, again, that might be willing to let bygones be bygones, what I would say overly compassionate, and it was just based on her responses about position, her responses to little subtle things like her teaching piano lessons and the magazines she chose. We don't have a lot to base these things on, so that's how I made those choices.

THE COURT: All right. Thank you. And I'm satisfied with your explanation. I find with regard to peremptory challenges No. 6, Tamara Thornton, No. 7 Linda Valerio, No. 10, Joyce Gonzalez, and No. 19, Paula Morely are gender neutral, they are related specifically to this case. They were clearly stated and they are specific and legitimate. Therefore I am denying the challenge based on gender. I also note this is a jury of four men and four women.

MR. **BURMESTER:** Yes, Your Honor.

THE COURT: All right. Thank you. Be back in about

an nour. See you then. And we can be off the record.

(A recess was taken.)